

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**VEOLIA TRANSPORTATION
SERVICES, INC.,**

and

**AMALGAMATED TRANSIT
UNION, LOCAL 1637, AFL-CIO**

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Case No. 28-RC-071479

**UNION'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR
DECISION AND ORDER DATED FEBRUARY 2, 2012**

Submitted by:

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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

VEOLIA TRANSPORTATION)	Case No. 28-RC-071479
SERVICES, INC.,)	
)	
and)	Hearing Held in Las Vegas, NV on
)	January 9, 10, 11, 12, 13 and 17, 2012
)	
AMALGAMATED TRANSIT)	Before Hearing Officer
UNION, LOCAL 1637, AFL-CIO)	Michael J. Johnson

**UNION’S REQUEST FOR REVIEW OF REGIONAL DIRECTOR
DECISION AND ORDER DATED FEBRUARY 2, 2012**

I. REQUEST FOR REVIEW

In accordance with Section 102.67 of the Rules and Regulations of the National Labor Relations Board (“NLRB”), Amalgamated Transit Union (“ATU”) Local 1637 (hereafter “Union”) respectfully files this Request for Review of the Regional Director’s Decision and Order (“Decision”) dated February 2, 2012 in the above-captioned case. The Request for Review should be granted on the following grounds:

1. The Decision departs from officially reported Board precedent and, as such, a substantial question of law exists.
2. The Decision is clearly erroneous on substantial factual issues, as evidenced by the record, and such error prejudicially affects the rights of the Union and the road supervisors who wish to be a part of the Union.

The Regional Director’s decision departs from Board precedent by disregarding the Board’s definition of “effectively recommend” discipline as explained in its recent decision in *DIRECTV U.S.*, 357 NLRB No. 149 (December 22, 2011). The decision also changes the

definition of “reward” for purposes of Section 2(11), making it inconsistent with longstanding board precedent. Additionally, the Regional Director’s Decision ignores basic tenets of Board law, for example, conflicting or otherwise inconclusive evidence cannot establish supervisory status. See e.g., *Phelps Cmty. Med. Ctr.*, 295 NLRB 486, 490 (1989).

Further, as explained in detail below, the Regional Director reached his incorrect legal conclusion by way of a number of factual findings that are clearly erroneous and prejudicially affected the rights of ATU Local 1637 and the employees in the petitioned-for unit.

II. HISTORY OF THE CASE

On December 20, 2011, Amalgamated Transit Union Local 1637 (“Union”) informed Veolia Transportation Services (“Veolia” or “Employer”) that it had the necessary level of support from the road supervisors and asked the Employer for recognition. (Tr. 1087:24-25; 1088:1-3.) Veolia stated they would get back to the Union but never did. (Tr. 1088:4-8.)

The Union filed an RC petition (28-RC-071479) on December 28, 2011, seeking an election in which a group of approximately forty (40) road supervisors would choose whether to be represented by Amalgamated Transit Union Local 1637, the current exclusive bargaining representative for the Employer’s coach operators (bus drivers), mechanics, body mechanics, service workers, and parts clerk/specialists.

After the Employer learned of the Union’s intent to represent road supervisors, it began instituting changes to the road supervisors’ job duties. For example, the Employer circulated a new observation notice (or “OBN”) purportedly granting road supervisors the authority to recommend discipline. Specifically, On December 30, 2011, *ten days after* the Union notified the Employer of its intent to represent road supervisors and *two days after* it filed its petition,

Veolia's Field Supervision Manager, Trevor Halleran, issued a memorandum to road supervisors regarding a new observation notice procedure. (UX-2.)

In that memorandum, Halleran notified road supervisors that, when completing an observation notice, they should cite the contract article and/or rule that has been violated and recommend what the next disciplinary step should be. (UX-2.)¹ The revised observation notice states road supervisors can issue discipline; this is new, as road supervisors have never been able to issue discipline, nor have they been trained to give discipline. (Tr. 748:15-19.) The three current road supervisors who testified at the hearing stated that the new observation form is not currently in use. (Tr. 950:11-12; 887:25; 888:1-2; 747:24-25; 748:1.) There was no evidence to the contrary.

A hearing was held before Hearing Officer Michael J. Johnson in Region 28, located in Las Vegas, Nevada, on the issue of whether or not the road supervisors are "supervisors" within the meaning of the National Labor Relations Act. That hearing lasted six (6) days – January 9, 10, 11, 12, 13 and 17, 2012. The Employer put on six (6) witnesses, none of which were current road supervisors. The transcript of the hearing spanned well over 1,100 pages. In addition, there were approximately 100 exhibits in the record.

The Regional Director issued his decision on February 2, 2012, less than one week after the parties' post-hearing briefs were due. A copy of that decision is attached hereto as "Exhibit A."

¹ Attached to Halleran's December 30, 2011 memorandum was Veolia's revised observation notice form. (UX-2.) The revised form differs drastically from the former observation notice form. (Tr. 748:11-19; see also, CX-10, UX-2.) Specifically, the new observation notice form includes a space for "discussion with operator." (UX-2.) The revised observation notice form also includes a section for "supervisor recommended corrective action." (UX-2.)

III. STATEMENT OF THE FACTS²

1. Background

a. *Veolia Transportation Services, Inc.*

Veolia Transportation Services, Inc. (“the Employer” or “Veolia”) operates a public transportation system for Las Vegas, Henderson, and North Las Vegas. (Tr. 18:20-23.) The Employer operates buses, also referred to as coaches, and provides fixed route bus service, pursuant to its contract with the Regional Transportation Commission (RTC). (Tr. 18:24-25; 19:1-3; 28:9-17.) A fixed route bus system is one which has a fixed schedule and set locations where the buses stop to pick up and drop off passengers. (Tr. 28:18-23.)

b. *Amalgamated Transit Union Local 1637*

The Employer’s coach operators are represented by the Amalgamated Transit Union (ATU) Local 1637 (“the Union”). (Tr. 21:10-15.) The Union is also the exclusive bargaining representative for the Employer’s Mechanics (A, B, C), Body Mechanics (A, B, C), Service Workers, and Parts Clerk/Specialists. (CX-2, at p.6, section 4.1.)

c. *Job Titles and Duties*

i. **Coach Operator**

Currently, Veolia employs approximately 750 buses drivers, also referred to as coach operators. (Tr. 19:15-17.)

ii. **Senior Supervisors**

There are two types of Senior Supervisors: administrative senior supervisors and senior road supervisors. (Tr. 46:2-8; CX-7.) Administrative senior supervisors are responsible for administering discipline to coach operators. (Tr. 46:20-24.)

² Due to the large factual record in this case, the Union hereby offers a truncated version of the facts. Attached hereto as “Exhibit B,” however, is the Union’s Post-Hearing brief which contains a more complete version of the factual record.

Currently, Veolia has four senior road supervisors. (Tr. 50:20-23; CX-7.) The senior road supervisors are referred to as field seniors; they are more directly responsible for the road supervisors than the administrative senior supervisors. (Tr. 51:1-4.)

iii. **Road Supervisors**

Currently, Veolia employs approximately 40 road supervisors. (CX-11.)³ Road supervisors are primarily responsible for responding to calls they receive from BOC and supporting the coach operators. (Tr. 776:3-5; 54:13-15.)

Road supervisors are also dispatched to accidents by BOC where they are required to fill out an accident kit that is supplied to them by the Employer. (Tr. 888:19-25; 889:1-7.) Road supervisors do not determine who was at fault in the accident, however. (Tr. 762:4-7.) Nor are road supervisors asked for their opinion on whether the accident was preventable or non-preventable. (Tr. 762:8-14; 889:8-10; 951:25-952:1-2.) Rather, it is the Safety Department that determines whether an accident is deemed preventable (also referred to as “chargeable”) or non-preventable (also referred to as “non-chargeable”). (Tr. 674:21-25-675:1-3; 675:10-12.)⁴A preventable (or chargeable) accident results in discipline; a non-preventable (or non-chargeable) accident does not. (Tr. 675:4-9.) Road supervisors do not have the discretion or authority to determine which accidents are preventable and therefore will result in discipline. (Tr. 676:11-18.)

³ The road supervisors are referred to as “transit supervisors” on that exhibit. (CX-11.)

⁴ It is also the safety department, not the road supervisor that gets the police report, if any, following an accident and reviews it. (Tr. 673:16-20.)

2. Facts Regarding 2(11) Indicia.⁵

a. *Road Supervisors Do Not Reward or Effectively Recommend Rewards.*

Three current road supervisors (Myers, Thomas, and Jackson) and one former road supervisor (Green) all testified that as road supervisors they have never awarded anyone with a pay raise. (Tr. 650:24-25; 742:24-25; 743:1; 884:23-25; 948:22-24.) The current road supervisors testified they lack the authority to do so. (Tr. 743:2-3; 885:1-2; 948:25; 949:1.)

1. **“Pat on the Back”**

Road supervisors can submit observation notices for a “pat on the back” for coach operators. (Tr. 636:10-11; 743:16-18.) Road supervisors issue a “pat on the back” to coach operators who have gone above and beyond and exhibited good customer service. (Tr. 636:10-16, 20-21.) Mr. Green testified that he did not exercise discretion in issuing coach operators “pats on the back,” as he simply did so if he saw them doing anything right within the Company’s policies and procedures and rules and regulations. (Tr. 637:14-21.) Those “pats on the back” carry no monetary award or significance. (Tr. 752:8-14.)⁶

2. **The “On the Spot” Award**

An “On the Spot” award goes to someone that has really gone over and above their job duties. (Tr. 753:9-10.) Recipients of the “On the Spot” award receive a certificate and approximately \$100 before taxes. (Tr. 75:20-24; 752:14-15.) While road supervisors can nominate coach operators for the “On the Spot” award, road supervisors do not make the

⁵ The Decision incorrectly found that road supervisors possess 2(11) indicia of discipline and reward. The Decision did not find road supervisors possess any of the other statutory indicia – namely, hiring, suspension, lay off, recall, promotion, discharge, assignment, responsibly direct, or adjust other employees’ grievances.

⁶ Moreover, Senior Supervisor Barry Goldsmith admitted that he is not aware of any pat on the back, or a large number of pats on the back, ever leading to the promotion of any coach operator. (Tr. 474:10-15.)

decision of who receives the award. (Tr. 749:2-7.) Rather, nominations are submitted to senior supervisors and management staff who determine who will receive the award. (Tr. 749:9-11.) Current road supervisor Myers testified that she has only nominated one person for an “On the Spot” award since she became a road supervisor in April 2008. (Tr. 753:18-19.)

Current road supervisors Thomas and Jackson testified they have never nominated anyone for the “On the Spot” award. (Tr. 918:22-24; 951:12-13.) Thomas testified that she does not know if she has the authority to do so. (Tr. 918:25; 919:1-4.) BOC Manager Ryan Neale admitted that every “On the Spot” award nomination does not result in the coach operator being awarded the “On the Spot” award. (Tr. 302:1-4.)⁷

b. Road Supervisors Do Not Discipline or Effectively Recommend Discipline.

i. Road supervisors do not discipline.

Road supervisors can issue observation notices (also referred to as “OBNs”); however, Green, Myers, Thomas, and Jackson all testified that an observation notice is just that – an observation notice, a document noting something the road supervisor has observed. (Tr. 649:21-23; 743:8-13; 885:7-13; 949:6-7.)

Observation Notices Are Not Discipline.

The Employer’s witness, Kenneth Green, currently a senior operations supervisor, admitted the observation notice is not discipline. (Tr. 649:19-22.) Moreover, Human Resources Director Elin Fehr testified that when the Union requests all discipline related to a particular coach operator, she does not supply observation notices regarding that coach operator. (Tr. 602:20-25.) Rather, the Employer produces written suspensions and conditions of employment.

⁷ Yet, Neale also testified that senior supervisors “adopt” the recommendation of the road supervisors with respect to the “On the Spot” award. (Tr. 241:18-20.) Clearly this cannot be true; if it were, every nomination by a road supervisor would result in an award. Thus, in order for the senior supervisor to determine if a coach operator receives the “On the Spot” award or not, he or she must conduct an independent investigation.

(Tr. 603:11-12.) Fehr testified, “We haven’t supplied the observation notices. I don’t know why. I can’t answer the question why, but we haven’t supplied that when they have requested.”

(Tr. 603:13-19.) Moreover, the Employer presented no evidence that an observation notice, in and of itself, affects a coach operator’s job status or tenure.

a. *Road Supervisors Do Not Effectively Recommend Discipline.*

Green, Myers, Thomas, and Jackson all testified that they have never recommended discipline with the observation notice. (Tr. 645:13-22; 748:23-25; 749:1; 886:23-25; 949:18-20.) In fact, Green admitted that he did not believe he even had the authority to recommend discipline when he served as a road supervisor from June 2010 to October 2011. (Tr. 645:23-25; 646:1.)

i. **“Coaching” and “counseling” is not discipline.**

The Employer claims that road supervisors’ observation notices have led to “coaching” and “counseling” of coach operators by senior supervisors. “Coaching” and “counseling” are not discipline, however. The current “Disciplinary Notice” used by Veolia only references the following disciplinary options: “verbal warning,” “written warning,” “suspension,” “condition of employment,” and “termination.” (See, CX-67; Tr. 673:22-25; 674:1-5; 674:9-19.) Moreover, “coaching” and “counseling” is referenced in the parties’ collective bargaining agreement (CBA) with respect to attendance infractions only. (CX-2, p 13; Tr. 601:22-25; 602:1-12.) Road supervisors, however, do not have any involvement in attendance issues or discipline for attendance infractions. (Tr. 771:25; 772:1-4.)⁸

⁸ Moreover, there was testimony that coaching and counseling are not discipline. (Tr. 1111:4-6.) Specifically, coach operator William Farmer testified that whenever he has been given a coaching, he was always told that it was not discipline. (Tr. 1111:8-9.) Farmer testified that when coach operators are issued discipline, it is on the Employer’s actual “Disciplinary Notice” form. (Tr. 1111:9-11.) Jeffrey Raske also testified that he has been told coaching and counseling are not discipline. (Tr. 1095:19-21.) Specifically, Senior Supervisor Barry Goldsmith called Raske, then a coach operator, in to see him about late pull-outs a couple years ago. (Tr. 1096:8-12; 1098:20-24.) Raske gave his explanation and

ii. **The Employer conducts independent investigations and review.**

Even if “coaching” and “counseling” were discipline, Veolia conducts an independent investigation and review prior to deciding whether or not to administer “coaching” and “counseling.” The observation notice itself states, “A copy of this Observation will be forwarded to the Senior Transportation/ Operations Supervisor for Review.” (CX-10.) In fact, after a road supervisor submits an observation notice, it is reviewed by *at least* two (2) higher-ranking Company officials before the senior supervisor makes a decision whether or not to “coach” or “counsel” the bus driver. (Tr. 335:12-24; 642:2-6.) Specifically, all observation notices are first sent to Mariann Kastner,⁹ Veolia’s assistant operations manager, who reviews them and also reviews the coach operator’s work history. (Tr. 465:1-3; 642:2-11.) Kastner then forwards the observation notices to the administrative senior supervisor. (Tr. 642:2-11.)

The senior supervisor then reviews the observation notice and speaks with the coach operator. (Tr. 505:17-18; 462:7-14.) During that time, coach operators are allowed to present their side of the story with respect to the observation notice. (Tr. 460:3-5.) Senior supervisor Barry Goldsmith admitted that during those discussions with coach operators he might learn new information he had not received from the road supervisor. (Tr. 462:7-14.) If the observation notice involved an accident or incident, then the senior supervisor reviews the accident/incident log in the operations control center for background information about the event. (Tr. 505:16-18; 545:20-24.)

Goldsmith had a paper for him to sign. (Tr. 1096:12-14.) At that time, Goldsmith stated it was a coaching, not discipline, and it would not lead to discipline. (Tr. 1096:14-15.)

⁹ Mariann Kastner did not testify at the hearing.

The senior supervisors admit that they have rejected or discarded road supervisors' observation notices. (Tr. 458:9-12; 547:3-7.)¹⁰ In fact, the OBN/POB disposition form has a section which states, "The OBN was discarded due to the following reasons: _____." (See, CX-42; Tr. 458:20-25; 459:1-2.)

The senior supervisor also determines the level of discipline, if any, to administer to the coach operator. (Tr. 454:24; 467:15-17.) For example, Goldsmith testified that the Employer has a "zero tolerance" policy for cell phone violations; yet, he decided to issue a one-day suspension and final warning to a coach operator who committed such an infraction. (Tr. 453:15-20.) Goldsmith testified that while he determined that the violation merited a one-day suspension and a final warning in that case, he had the discretion to recommend the coach operator be terminated. (Tr. 453:15-23; 454:24.) Goldsmith further testified he has discretion to determine if violations are "excessive" and decide the level of discipline. (Tr. 467:5-11.) In order to make that determination, Goldsmith admittedly seeks out and uses information outside of the observation notices. (Tr. 466:23-25; 467:1-9; 467:14-17.)

IV. ARGUMENT

1. The Regional Director's Decision Departs from Officially Reported Board Precedent and, As Such, A Substantial Question of Law Exists.

- a. *The Regional Director's decision disregards the Board's definition of "effectively recommend" discipline as explained in its recent decision in DIRECTV U.S.*

In his decision, the Regional Director quickly and incorrectly dismisses the Board's recent decision in *DIRECTV U.S.*, 357 NLRB No. 149, slip op. at 1 (December 22, 2011). In doing so, the Regional Director refused to follow the Board's recent directive regarding what

¹⁰ Senior supervisor Barry Goldsmith contradicted himself on this point. He first testified he relies on the road supervisors' observation notices 100% of the time; he then testified that he has rejected or discarded road supervisors' observation notices. (Tr. 432:19-25; 475:16-17; 458:9-12.) Goldsmith testified he doesn't really know how many observation notices he has rejected or discarded. (Tr. 459:3-5.)

constitutes an “effective recommendation” of discipline, or lack thereof, for purposes of discipline under Section 2(11) of the Act, as explained herein.

As the Regional Director correctly notes, the field supervisors in *DIRECTV U.S.* “had the authority to initiate the disciplinary process by drafting an ‘employee consultation form’ (EFC) (*sic*).” (Decision, at p. 5.) That employee consultation form (ECF) required the field supervisor to identify the category of offense; to describe the incident for which discipline was being imposed; to provide information regarding expectations for the future and the possibility of future discipline; and to identify an appropriate level of discipline. *DIRECTV U.S.*, 357 NLRB No. 149, slip op. at 1-2, fn. 4.

By contrast, in this case, while road supervisors can issue can issue observation notices (OBNs), the three current road supervisors and one former road supervisor who testified at the hearing all stated that an OBN is just that – an observation notice, a document noting something the road supervisor has observed. (Tr. 649:21-23; 743:8-13; 885:7-13; 949:6-7.) The Employer’s witness, Kenneth Green, currently a senior operations supervisor, admitted the observation notice is not discipline. (Tr. 649:19-22.) The road supervisors who testified all stated that they have never recommended discipline with the observation notice. (Tr. 645:13-22; 748:23-25; 749:1; 886:23-25; 949:18-20.) In fact, Green admitted that he did not believe he even had the authority to recommend discipline when he served as a road supervisor from June 2010 to October 2011. (Tr. 645:23-25; 646:1.) The OBN form does not even have a space for the road supervisor to recommend discipline.¹¹

¹¹ Tellingly, after the present petition was filed, the Employer advised road supervisors that they purportedly have the authority to recommend discipline on observation notices. (Tr. 950:6-10; UX-2.) The Employer even went so far as to revise its observation notice to include specific, new sections for the road supervisor’s disciplinary recommendation. (UX-2.) The undisputed testimony at the hearing is that this new observation notice form is not currently in use. (Tr. 950:11-12; 887:25; 888:1-2; 747:24-25; 748:1.) The marked revisions to the observation notice form, as well as the timing of those revisions,

Moreover, as the Regional Director noted, reviewers of the employee consultation form (ECF) in *DIRECTV U.S.* could “modify the level of discipline, or decide that the EFC (*sic*) should not itself be issued.” (Decision, at p. 5.) The same is true in this case. Here, the senior supervisor determines the level of discipline, if any, to administer to the coach operator. (Tr. 454:24; 467:15-17.) For example, Goldsmith testified that the Employer has a “zero tolerance” policy for cell phone violations; yet, he decided to issue a one-day suspension and final warning to a coach operator who committed such an infraction. (Tr. 453:15-20.) Goldsmith testified that while he determined that the violation merited a one-day suspension and a final warning in that case, he had the discretion to recommend the coach operator be terminated. (Tr. 453:15-23; 454:24.) Goldsmith further testified he has discretion to determine if violations are “excessive” and decide the level of discipline. (Tr. 467:5-11.) In order to make that determination, Goldsmith admittedly seeks out and uses information outside of the observation notices. (Tr. 466:23-25; 467:1-9; 467:14-17.) The senior supervisors admit that they have rejected or discarded road supervisors’ observation notices. (Tr. 458:9-12; 547:3-7.) In fact, the OBN/POB disposition form has a section which states, “The OBN was discarded due to the following reasons: _____.” (See, CX-42; Tr. 458:20-25; 459:1-2.)

In *DIRECTV U.S.*, the Board found the Employer had presented no documentary evidence of suspensions or discharges issued or recommended by field supervisors. *DIRECTV U.S.*, *supra*, at 3-4. The same is true here. The Employer offered eleven (11) notices of suspension into evidence at the hearing. (CX-38; CX-40; CX-53; CX-67; CX-71; CX-72, pp. 26,

however, speak volumes. If road supervisors already possessed the authority effectively to recommend discipline and had been previously told so, there would have been no reason to revise the observation notice form to include a road supervisor’s recommendation section and to inform road supervisors that they (allegedly) have the authority to recommend and issue discipline. The revised observation notice form therefore smacks of subterfuge; an attempt by the Employer to make it appear road supervisors have supervisory authority when, in fact, they do not. See, *Dynasteel Corporation v. NLRB*, 476 F.3d 253, 258 (5th Cir. 2007) (recognizing an employer’s subterfuge to make it appear that an employee is a supervisor).

64, 74, 79, 89, and 93.)¹² None of those suspensions were approved or signed off on by a road supervisor.¹³ (*Id.*) Nor do any of the suspension notices evidence that a road supervisor ever recommended suspension. (*Id.*)

The road supervisors who testified at the hearing each testified that as road supervisors they have never fired or discharged anyone. (Tr. 650:10-11; 742:9-10; 884:7-8; 948:3-4.) They also testified they lack the authority to do so as road supervisors. (Tr. 742:11-12; 884:9-10; 948:5-6.) The Employer failed to present any evidence that a road supervisor has ever discharged anyone or effectively recommended discharge. In fact, Veolia's Human Resources Manager, Elin Fehr, testified that she receives recommendations for discharge from Senior Supervisors, not road supervisors. (Tr. 611:3-11.) Fehr testified that she must review and sign off on all terminations. (Tr. 611:2; 611:17-18.) In addition, all terminations must be signed off on by several other people, including the General Manager, Larry Kucera, and the Human Resources Regional Director, Phil Isaac. (Tr. 611:17-25; 612:1.) Thus, even Senior Supervisors¹⁴ cannot terminate an employee without approval from human resources and others. (Tr. 612:8-9.)

Based on the foregoing, the Regional Director failed to apply the Board's directive in the recent decision of *DIRECTV U.S.*, 357 NLRB No. 149, slip op. at 1 (December 22, 2011) regarding what constitutes an "effective recommendation" of discipline, or lack thereof, for

¹² Of those eleven (11) notices of suspension, however, four (4) explicitly state the suspensions were waived by the senior supervisor who issued the discipline. (See, CX-53; CX-72, pp. 64, 74, and 79.)

¹³ In fact, all three (3) of those eleven (11) notices referencing accidents explicitly state that it was the Safety Department, not a road supervisor, who determined the accident in question (which led to the suspension) was preventable. (See, CX-67; CX-71; CX-72, p. 26.)

¹⁴ Senior Supervisors rank higher than road supervisors in the Employer's hierarchy. (Tr. 46:2-8; 51:3-4; CX-7.) In fact, Senior Supervisors are directly responsible for the road supervisors and are responsible for administering discipline to coach operators. (Tr. 46:20-24; 51:1-4.)

purposes of discipline under Section 2(11) of the Act. As a result, the Regional Director's decision is hopelessly inconsistent with the Board's established precedent and must be reviewed to cure this irreconcilable difference.

- b. *The Regional Director's decision changes the definition of "reward" for purposes of Section 2(11), making it inconsistent with longstanding board precedent.*

The Regional Director erroneously found that, because road supervisors can recommend an operator for an "On the Spot" award that may result in a one-time monetary award of \$100¹⁵ to that operator, road supervisors "reward" for purposes of section 2(11) of the Act. Thus, under the Regional Director's decision, if one employee has the authority to recommend than another employee receive a \$100 bonus, the recommending employee (by virtue of that "recommendation"¹⁶) is a "supervisor" within the meaning of the Act. Clearly, such conclusion violates the intent of the National Labor Relations Act, as well as longstanding Board law on the definition of "reward."

As the Board has previously stated, the term "reward" in Section 2(11) may not properly be read *in vacuo* such that it would encompass any function that may in any way affect the compensation of employees. *Brown & Sharpe Mfg. Co.*, 87 NLRB 1031, 1047 (1949). Such a construction, the Board stated, would be "at variance with the intent of Congress", as it is clear from the legislative history that Congress meant that term to be confined to "bona fide supervisors." *Id.* Rather, the word "reward" must be read in *pari materia* with the accompanying indicia of Section 2(11) and, "[i]n that context, can be construed to refer, as the sponsors of the legislation expressly stated, only to powers normally exercised by foremen or

¹⁵ The Regional Director made a factual error with respect to "On the Spot" awards, as discussed below.

¹⁶ Moreover, that "recommendation" is reviewed, investigated, and not always followed, by higher management. See, Argument section 1(c), *infra*.

persons of like or related rank, such as the power to grant or recommend merit wage increases....” *Id.*

Historically, the Board has found the authority to “reward,” for purposes of section 2(11), exists where one can reward, or effectively recommend, a merit wage increase. See e.g., *Bayou Manor Health Center, Inc.*, 311 NLRB 955 (1993) (where the employer allocated percentage wage increases of up to 5 percent based on the evaluation scores that were given to the CNAs by the LPNs); *Pine Manor Nursing Center*, 270 NLRB 1008 (1984) (where charge nurses could reward an employee with a 10-cent increase in his or her hourly wage).

Under the Regional Director’s decision, however, a “reward” for purposes of Section 2(11) can be a one-time, \$100 (before taxes) monetary award. Such a marked departure from longstanding Board law creates a dangerous result. Employers can authorize employees to recommend a \$100 award for one another, thereby turning them all into “supervisors” under the Act and forever depriving them of union representation.

- c. *The Regional Director’s decision misapplies the law regarding “direct connection” in the context of rewards for purposes of Section 2(11).*

The Regional Director states in his decision that there is a “direct link between the issuance of a POB [pat on the back] and an On the Spot award which directly affects the wages of those employees who receive it.” (Decision, at p. 7.) The standard is not whether the “reward” in question directly affects the wages of the employee who receives it, however; as clearly, a monetary award will affect an employee’s wages. Rather, the standard is whether *the alleged supervisor’s evaluation* (or nomination) of the employee directly affects the merit pay increase to the employee.¹⁷ The case cited by the Regional Director – *Elmhurst Extended Care*,

¹⁷ See e.g., *National Labor Relations Board v. Hilliard Development Corporation*, 187 F.3d 133, 145 (1999) (finding “there was adequate evidence to support the Board’s conclusion that merit pay is not directly linked to the evaluations.”); *Pine Manor Nursing Center*, 270 NLRB 1008, 1009 (1984) (wherein

329 NLRB 535 (1999) – establishes as much. Therein the Board held the Employer had not met its burden of establishing that the annual evaluations completed by charge nurses lead directly to personnel actions which affected the wages of the CNAs. *Elmhurst Extended Care*, 329 NLRB 535, 538 (1999).

Moreover, the Board has historically found there to be a “direct connection” between an evaluation or recommendation and merit pay only where those evaluations or recommendations are not reviewed or investigated by others. For example, in *National Labor Relations Board v. Hilliard Development Corporation*, 187 F.3d 133, 145 (1999) (“*Hilliard*”), the First Circuit Court of Appeal held “there really is no direct connection between the evaluation of an [employee] given by a charge or district nurse and the merit pay increase, if any, that the [employee] receives. Management retained and exercised the power over several intervening factors.”

Specifically, the court in *Hilliard* found that the evaluations were independently reviewed by higher management prior to the award of the merit increase. *Id.* at 145. The same is true here. All “On the Spot” award nominations submitted by road supervisors are reviewed by the senior supervisors and management staff who ultimately determine whether or not the nominated employees will receive the “On the Spot” award. (Tr. 749:5-11.) Road supervisors are not the final decision makers regarding who receives the “On the Spot” award. (Tr. 749:5-7.) The Employer admitted that every “On the Spot” award nomination does not result in the coach operator being awarded the “On the Spot” award. (Tr. 302:1-4.) Thus, there is not a “direct

the Board states: “The evaluation does not affect the aides’ salary or job tenure.”); *Bayou Manor Health Center, Inc.*, 311 NLRB 955 (1993) (wherein the Board found “evaluations completed by the LPNs affect the CNAs’ salaries, as there is a direct correlation between the evaluations and the merit increases or occasional departmental bonuses awarded.”); *Wal-Mart Stores, Inc.*, 355 NLRB 1310 (2001) (wherein the Board found “the sporting goods department manager makes the determination as to the appropriate rating on the appraisal and there is a direct link between this rating and the rate of pay increase, if any, for the appraised employee.”).

connection” between the “On the Spot” award nominations by road supervisors and the “reward” of \$100 (before taxes) to the operator, as some of those nominations do not result in any monetary award at all.

- d. *The Regional Director’s decision simply ignores conflicting evidence and accepts conclusory evidence in contradiction to well-established Board precedent.*

It is a basic tenet of Board law that “whenever the evidence is in conflict or otherwise inconclusive on particular indicia of supervisor authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia.” *Phelps Cmty. Med. Ctr.*, 295 NLRB 486, 490 (1989). In his decision, however, the Regional Director simply ignored conflicting evidence, failing to even cite, much less discuss, that evidence. For example, the Regional Director states, “The facts and determinations set forth by the RS, as well as the merits of the infraction cited by the RS, are not independently investigated by the AS Supervisors.” (Decision, p. 6.)

It is undisputed that every observation notice is reviewed by *at least* two (2) higher-ranking Company officials¹⁸ before the senior supervisor, not the road supervisor, makes a decision on what, if anything, to do.¹⁹ (Tr. 505:17-18; 462:7-14; 642:2-6.) Specifically, all observation notices are first sent to Mariann Kastner,²⁰ Veolia’s assistant operations manager,

¹⁸ As such, the facts in this case are analogous to those in *DIRECTV U.S.* where the field supervisors’ employee consultation forms (ECFs) were all subject to multiple levels of review by superiors. *DIRECTV U.S.*, 357 NLRB No. 149 (December 22, 2011), at p. 3. In *DirecTV*, the Board found the field supervisors were not supervisors within the meaning of Section 2(11) of the Act. *Id.* at p. 4.

¹⁹ It is the senior supervisors, not the road supervisors, who take action as a result of the observation notice. In *DIRECTV U.S.*, it was the field supervisors (whose supervisory status was at issue) that actually met with the employee to present and explain the employee consultation form (ECF). *DIRECTV U.S.*, 357 NLRB No. 149, at p. 2 (December 22, 2011). Yet, the Board still found that the field supervisors did not discipline or effectively recommend discipline within the meaning of Section 2(11) of the Act. *Id.* at p. 4.

²⁰ Mariann Kastner did not testify at the hearing. The absence of evidence that Kastner accepts the observation notices as written and does not conduct an independent investigation warrants a conclusion

who reviews them and also reviews the coach operator's work history. (Tr. 465:1-3; 642:2-11.) Kastner then forwards the observation notices to the administrative senior supervisor. (Tr. 642:2-11.)

The senior supervisor then reviews the observation notice and speaks with the coach operator. (Tr. 505:17-18; 462:7-14; 491:1-4.) During that time, coach operators are allowed to present their side of the story with respect to the observation notice. (Tr. 460:3-5.)²¹ Senior supervisor Barry Goldsmith admitted that during those discussions with coach operators he might learn new information he had not received from the road supervisor. (Tr. 462:7-14.) Moreover, if the observation notice involved an accident or incident, then the senior supervisor reviews the accident/incident log in the operations control center for background information about the event. (Tr. 505:16-18; 545:20-24.)

The fact that Senior Supervisors reject or discard road supervisors' observation notices further proves they conduct an independent investigation; after all, how would they have known whether to reject or discard the observation notice?²² Senior Supervisor Mark Bailey admitted

that the road supervisors do not effectively recommend discipline. See, *DIRECTV U.S.*, 357 NLRB No. 149 (December 22, 2011), fn. 11, at p. 3.

²¹ For example, coach operator William Farmer testified that he has met with Senior Supervisors – specifically, Doug Vasquez and Kelvin Manzanares – about observation notices that have been written about him. (Tr. 1111:14-19; 1112:1-7.) Farmer testified he told them his side of the story. (Tr. 1112:8-11.) Farmer has had observation notices written about him that did not result in discipline. (Tr. 1111:24-25; 1112:1.)

²² In response to their counsel's repeated leading questions, Employer's witnesses testified Senior Supervisors do not conduct an investigation on observation notices. (See e.g., Tr. 383:21-25; 384:1-9; 537:2-4; 697:4-16.) These statements are purely conclusory, however; "purely conclusory evidence is not sufficient to establish supervisory authority." *Loyalhanna Care Center*, 352 NLRB 863, 864 (2008); see also, *Lynwood Manor*, 350 NLRB 489, 490 (2007); *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006); *Golden Crest Healthcare Center*, 348 NLRB 727, 921 (2006). Moreover, they contradict the testimony that Senior Supervisors review the observation notice and speak with the coach operators, during which time, coach operators are allowed to present their side of the story. (Tr. 505:17-18; 460:3-5; 462:7-14; 491:1-4.) The fact Senior Supervisors reject or discard observation notices also belies their testimony that they do no investigation on observation notices.

that he does not adopt or follow the observation notices 100 percent of the time, stating “there are times when the Road Supervisor does not get the knowledge that I will get during the course of interacting with the Operator.” (Tr. 390:10-15.)

2. The Decision Is Clearly Erroneous on Substantial Factual Issues, As Evidenced By the Record, and Such Error Prejudicially Affects the Rights of the Union and the Road Supervisors.

The decision is replete with errors and omissions that form the basis for the incorrect conclusion that road supervisors are “supervisors” within the meaning of the Act.²³ Those errors prejudicially affect the rights of the Union and the road supervisors who have indicated their desire to be represented by the Union.

a. *A “Pat on the Back” does not result in any monetary award.*

In his Decision the Regional Director incorrectly concludes that road supervisors are supervisors within the meaning of the Act because they can “reward” operators. The Decision makes the erroneous statement that “Operators who receive a POB (pat on the back) may be recognized by the Employer in the form of a monetary award, generally consisting of \$100, a plaque, and a letter of recognition.” (Decision, at p. 6.) This is simply not true, as evidenced by the record. It is undisputed that a “pat on the back” (POB) carries no monetary award or significance. (Tr. 752:8-14.) Senior Supervisor Barry Goldsmith admitted that he is not aware of any pat on the back, or a large number of pats on the back, ever leading to the promotion of any coach operator. (Tr. 474:10-15.)

²³ The Union does not address all of the Decision’s factual errors and omissions herein, but addresses those that appear to have been most heavily relied on by the Regional Director in issuing his erroneous decision.

- b. *There is no “direct link” between a nomination for an “On the Spot” and the issuance of the award.*

The “On the Spot” award is a misnomer, to say the least; road supervisors do not and cannot award it on the spot. (Tr. 749:5-7.) Rather, road supervisors can only nominate a coach operator; their nomination is then reviewed by the senior supervisors and management staff who ultimately determine whether or not the coach operator merits the award. (Tr. 749:5-11.) Every “On the Spot” award nomination does not result in the coach operator actually receiving the award. (Tr. 302:1-4.) Because the road supervisors’ recommendations for “On the Spot” awards are independently investigated by superiors (as evidenced by the fact that all nominations do not result in awards), there is no “direct link” between the nomination and the award. See, *Children’s Farm Home*, 324 NLRB 61, 61 (1997) (to “effectively recommend” an action “generally means that the recommended action is taken without independent investigation by superiors....”).

- c. *The senior supervisor, not the road supervisor, has the discretion to decide whether to issue any discipline at all and, if so, what level of discipline.*

The Regional Director’s Decision incorrectly states, “once an [*sic*] RS completes an OBN, it is reviewed by an AS supervisor, who, relying on the OBN, determines the appropriate level of discipline to impose.” (Decision, at p. 5.) That statement erroneously presupposes that the AS supervisor (senior supervisor) issues discipline in response to all OBNs. That is simply not the case.

First, observation notices (OBNs) do not necessarily relate to coach operators. As current road supervisor Susan Thomas testified, observation notices refer to anything that would interrupt the smooth operations of the bus system including, for example, an overhanging tree limb that could possibly come in contact with a bus, or a bus stop that needs to be closed for some reason. (Tr. 885:7-13.) The Regional Director’s statement that “6 six [*sic*] to 12 OBNs are

issued daily” under his discussion of “Discipline” (Decision, at p. 5) is therefore misleading at best; as OBNs do not all relate or refer to coach operators.

Second, those road supervisors’ observation notices which relate to operators are not always ultimately adopted or followed. The senior supervisors admit that they have rejected or discarded road supervisors’ observation notices. (Tr. 458:9-12; 547:3-7.) In fact, the OBN/POB disposition form has a section which explicitly states, “The OBN was discarded due to the following reasons: _____.” (See, CX-42; Tr. 458:20-25; 459:1-2.)

d. *The senior supervisors’ meetings with operators are investigatory in nature.*

The Regional Director inaccurately states in his decision, “Having determined the appropriate level of discipline beforehand, the subsequent meeting with the operator, if requested, are [*sic*] not investigatory in nature.” (Decision, at p. 4.) Senior supervisor Barry Goldsmith admitted, however, that during those meetings with coach operators he might learn new information he had not received from the road supervisor. (Tr. 462:7-14.) Moreover, coach operator William Farmer testified that he has met with Senior Supervisors – specifically, Doug Vasquez and Kelvin Manzanares – about observation notices that have been written about him. (Tr. 1111:14-19; 1112:1-7.) Farmer testified he told them his side of the story, and some observation notices written about him did not result in discipline. (Tr. 1111:24-25; 1112:1; 1112:8-11.)

e. *Coaching and counseling are not discipline.*

In his decision, the Regional Director states, “In those instances where the AS Supervisor determines that coaching or counseling is adequate, the discipline is noted directly on the OBN.” (Decision, at p. 4.) “Coaching” and “counseling” are not discipline, however. The current “Disciplinary Notice” used by Veolia only references the following disciplinary options: “verbal

warning,” “written warning,” “suspension,” “condition of employment,” and “termination.” (See, CX-67; Tr. 673:22-25; 674:1-5; 674:9-19.) Moreover, “coaching” and “counseling” is referenced in the parties’ collective bargaining agreement (CBA) with respect to attendance infractions only. (CX-2, p 13; Tr. 601:22-25; 602:1-12.) Road supervisors, however, do not have any involvement in attendance issues or discipline for attendance infractions. (Tr. 771:25; 772:1-4.)

Moreover, there was testimony that coaching and counseling are not discipline. (Tr. 1111:4-6.) Specifically, coach operator William Farmer testified that whenever he has been given a coaching, he was always told that it was not discipline. (Tr. 1111:8-9.) Farmer testified that when coach operators are issued discipline, it is on the Employer’s actual “Disciplinary Notice” form. (Tr. 1111:9-11.) Jeffrey Raske also testified that he has been told coaching and counseling are not discipline. (Tr. 1095:19-21.) Specifically, Senior Supervisor Barry Goldsmith called Raske, then a coach operator, in to see him about late pull-outs a couple years ago. (Tr. 1096:8-12; 1098:20-24.) Raske gave his explanation and Goldsmith had a paper for him to sign. (Tr. 1096:12-14.) At that time, Goldsmith stated it was a coaching, not discipline, and it would not lead to discipline. (Tr. 1096:14-15.)

f. *Road supervisors rarely, if ever, learn what, if anything happened as a result of their observation notices.*

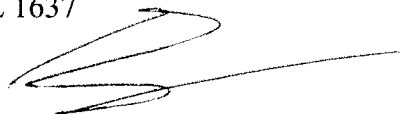
In his decision, the Regional Director inaccurately states, “Once the discipline is issued, a feedback memo is completed by the respective AS Supervisor detailing the level of discipline imposed upon by the operator. The feedback memo is also forwarded to the RS who issued the OBN.” (Decision, at p. 4.) The road supervisors testified that they are rarely, if ever, told about the disposition of their observation notices, however. (See e.g., Tr. 746:20-21; 896:10-14.) The Regional Director failed to cite, much less address, this contradictory evidence.

CONCLUSION

The Union respectfully requests that the Board rule the Regional Director erred in finding the Employer had satisfied its burden to prove, by a preponderance of the evidence, that road supervisors are "supervisors" within the meaning of the Act and set an election date.

Respectfully submitted,

AMALGAMATED TRANSIT UNION,
LOCAL 1637



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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of February, 2012, a true and correct copy of the above document electronically filed on the Board's website and sent to the following via U.S. mail and email:

Cornele A. Overstreet, Regional Director
NLRB, Region 28
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Las Vegas, NV 89101
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Geoff Gilbert
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EILEEN M. BISSEN

EXHIBIT A

RECEIVED

FEB 06 2012

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

Neyhart, Anderson,
Flynn & Grosboll

**VEOLIA TRANSPORTATION
SERVICES, INC.¹**

Employer

and

Case 28-RC-071479

**AMALGAMATED TRANSIT UNION,
LOCAL 1637, AFL-CIO²**

Petitioner

DECISION AND ORDER

Amalgamated Transit Union, Local 1637, AFL-CIO (the Petitioner), seeks to represent a unit of all full-time and part-time road supervisors (RSs) employed by Veolia Transportation Services, Inc., (the Employer), at its Las Vegas, Nevada, facilities.³ The unit sought by the Petitioner would exclude all other employees, office clerical employees, guards, and supervisors as defined in the National Labor Relations Act (Act). Contrary to the Petitioner, the Employer contends that the petitioned-for unit is inappropriate because RSs are supervisors under Section 2(11) of the Act. Based the record as a whole and for the reasons set forth below, I find that the Employer's RSs are statutory supervisors within the meaning of Section 2(11) of the Act, based primarily on their roles in the discipline and rewarding of coach operators, and on this basis I shall dismiss the petition.

DECISION

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. Hearing and Procedures: The Hearing Officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. Jurisdiction: The parties stipulated, and I find, that the Employer, a Maryland corporation, with an office and place of business in Las Vegas, Nevada, is engaged in providing

¹ The name of the Employer appears as amended at the hearing.

² The name of the Petitioner appears as amended at the hearing.

³ While the petition refers exclusively to RSs, during the proceeding it became apparent that RSs are also referred to as "Transit Supervisors," "Field Supervisors," and "Transit Service Supervisors." Therefore, any reference to RSs throughout this Decision also encompasses these other titles.

public transportation services in the metropolitan area of Las Vegas, Nevada. During the past 12 months, the Employer, in conducting its business operations described above, derived gross revenues in excess of \$250,000 and purchased and received at its Nevada facilities goods valued in excess of \$50,000 directly from points outside the State of Nevada. Accordingly, I find that the Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Board's assertion of jurisdiction in this matter will accomplish the purposes of the Act.

3. **Labor Organization Status:** The parties stipulated and I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

4. **Statutory Question:** A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. **Unit Finding:** The issue presented in this matter is whether Road Supervisors (RSs) are supervisors within the meaning of Section 2(11) of the Act. As discussed in more detail below, I conclude that RSs are statutory supervisors and are not employees within the meaning of Section 2(3) the Act. In setting forth the reasons for my decision, I shall provide an overview of the Employer's operations, followed by a description of the duties and functions of RSs, and the basis of my conclusion.

A. **The Employer's Operations**

The Employer, pursuant to its contract with the Regional Transportation Commission of Southern Nevada (RTC), operates a fixed-route public bus transportation service in the Las Vegas metropolitan area, which also includes North Las Vegas and Henderson, Nevada (the Employer's Las Vegas operations). Under the terms of the contract, the Employer is required to operate and manage a fixed-route bus service and maintain a fleet of buses, or "revenue vehicles," furnished by the RTC at facilities provided by the RTC. The Employer is also required to supply the workforce, equipment, and materials needed to operate the buses over the routes and service hours established by the RTC. To do so, the Employer is required to provide, maintain, and operate its own vehicles to support the operation and maintenance of the fixed route transportation service.

The Employer operates out of two facilities, referred to as the Simmons facility and the Sunset facility. Both facilities house administrative staff, coach operators (operators), managers, and bus yards where buses are parked. Currently, the Employer employs approximately 750 operators, who are responsible for the transportation of passengers. The majority of operators work out of the Sunset facility, though the facility to which an operator is assigned is dependant upon his or her assigned route.

The Employer's Simmons facility also houses the Bus Operations Center (the BOC) where the Employer's operations are centrally monitored. More specifically, the BOC serves as a centralized communications center where service is monitored through a computer system

through which operators, managers, and supervisors communicate. For example, operators who experience mechanical issues, disruptive passengers, emergencies, and any other issues effecting service, communicate with the BOC, which in turn dispatches RSs, local law enforcement, emergency services, or direct other appropriate responses. The BOC's goal in so doing is to maintain continuity of service.

B. Personnel and Management Structure

The Employer's Las Vegas operations are overseen by the General Manager, who is responsible for managing the Employer's personnel, management, and facilities. Reporting directly to the General Manager are the Manager of Training (currently vacant), the Field Supervision Manager, the manager of the BOC, and the Sunset Operations Manager. Of particular relevance to the issues presented in this case are the supervisors and employees overseen by the Field Supervision Manager, who is responsible for overseeing the Administrative Senior Supervisors (AS Supervisors), Senior Road Supervisors (Senior RSs), and RSs.

AS Supervisors are primarily responsible for managing the operators and administering discipline to operators for policy, safety, and attendance infractions. There are currently four AS Supervisors employed by the Employer, two at each facility. Senior RSs (also referred to as field seniors) are responsible for overseeing the work of RSs. Senior RSs conduct daily briefings with RSs and communicate information which may be needed by RSs to effectuate their duties. During daily briefings, issues that are of particular concern, such as safety matters and special events that impact service, are discussed. At these briefings, Senior RSs also distribute "tailgates" containing safety messages which RSs, in turn, are required to communicate to operators while out in the field.

1. Road Supervisors

The Employer currently employs approximately 43 RSs. RSs have several responsibilities, including supporting operators in carrying out their duties by disseminating information, making minor repairs to buses and fare boxes, removing disruptive passengers, reporting to accident scenes and conducting accident investigations, and responding to calls from the BOC. Moreover, RSs are responsible for ensuring that operators comply with the Employer's established policies and regulations while performing their duties. RSs work in the field monitoring operators and ensuring their compliance with safety and policy requirements, that RTC's route schedules are being followed, that customer service standards are met, and that operators are abiding by traffic laws and regulations.

To accomplish their duties and responsibilities, RSs have the authority to, and do, issue Observation Notices (OBN) to operators. OBNs may be issued where an operator is observed committing a violation of company policy. In addition to reporting operators who commit policy infractions, RSs can also issue operators a "Pat on the Back" (POB), a form of recognition for going above and beyond their assigned job duties. The issuance of a POB results in the verbal recognition of the recipient by the RS and an AS Supervisor for a job well done. It may also

result in the grant of an “On the Spot” award, which results in the recipient being given a letter of recognition, a plaque, and \$100.

When an OBN is issued to an operator for committing an infraction, the RS is authorized to meet with the operator to discuss the reasons for the issuance of the OBN and to obtain the operator’s signature. Once issued, regardless of whether the RS met with the operator, the OBN is forwarded to the Assistant Night Manager, who enters the OBN into a database maintained by the Employer for future reference and then forwards it to the appropriate AS Supervisor. The AS Supervisor then reviews the OBN, references the Employer’s database to determine how many, if any, violations the operator previously committed, and determines the appropriate level of discipline based upon the Employer’s progressive disciplinary policy. The AS Supervisor then meets with the operator and formally issues the discipline. Only in instances where the OBN is incomplete or when an operator requests the opportunity to do so are operators allowed to present their version of events. Having determined the appropriate level of discipline beforehand, the subsequent meeting with the operator, if requested, are not investigatory in nature.

In those instances where the AS Supervisor determines that a coaching or counseling is adequate, the discipline is noted directly on the OBN. Where it is determined that a higher level of discipline is warranted, a formal disciplinary notice is completed based on the OBN. Once the discipline is issued, a feedback memo is completed by the respective AS Supervisor detailing the level of discipline imposed upon the operator. The feedback memo is also forwarded to the RS who issued the OBN.

D. Legal Analysis

At issue is whether the Employer’s RSs are supervisors within the meaning of the Act. Section 2(3) of the Act specifically excludes supervisors from the definition of employees. Section 2(11) of the Act defines supervisors as follows:

...any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

When determining supervisory status, the Board exercises utmost care, as a finding of supervisory status removes an employee from the protections of the Act. *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995). The Board distinguishes two classes of workers: true supervisors vested with genuine management prerogatives, and employees such as “straw bosses, lead men, and set-up men” who are protected by the Act despite their performance of “minor supervisory duties.” Therefore, the dividing line between these two classes of workers, where Section 2(11) is concerned, is whether the putative supervisor exercises “genuine management prerogatives.” Those prerogatives are specifically identified as the 12 supervisory indicia set forth in Section

2(11) of the Act. Where the individual has authority to exercise (or effectively recommend the exercise of) at least one of those functions in the interest of the employer, and where such authority is exercised using independent judgment as opposed to a routine or clerical manner, Section 2(11) supervisory status is deemed to exist. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 688 (2006). Below I discuss the relevant supervisory criteria that apply to RSs in this case.

1. Discipline

The record establishes that RSs are primarily responsible for ensuring that operators are running on schedule and ensuring compliance with the Employer's policies and procedures. To accomplish these tasks, RSs are authorized to record and, where appropriate, issue OBNs. OBNs are issued to correct inappropriate conduct or performance and, as discussed below, serve a disciplinary purpose. By determining whether or not to complete an OBN, RSs exercise broad discretion in deciding whether or not to report infractions. In so doing, RSs evaluate and consider whether an operator's conduct or performance is appropriate, exercising independent judgment in the interest of the Employer. In determining whether to complete an OBN, an RS must consider a variety of factors, including, for example, whether the underlying matter involves issues beyond the control of the operator, or whether the operator acted in a rude, unprofessional, or discourteous manner, conduct that is subject to discipline. The record established that in the Employer's Las Vegas operations, approximately 6 six to 12 OBNs are issued daily.

As discussed above, once an RS completes an OBN, it is reviewed by an AS Supervisor, who, relying upon the OBN, determines the appropriate level of discipline to impose. The level of discipline issued by the AS Supervisor depends on a number of factors, including whether the operator has been the subject of a prior OBN for the same or similar conduct, the length of time since the last violation, and the severity of the violation committed. Once the RS prepares the OBN, the underlying incident is not further investigated. Rather, the violation as described by the RS is accepted as true by the AS Supervisor. The record shows that only in rare circumstances, e.g., where the OBN is challenged by the operator with convincing evidence or where the OBN is inadequately completed, does the issuance of an OBN by an RS not result in some form of discipline. While the RSs themselves do not directly determine the level of discipline imposed, RSs, by the act of issuing an OBN, initiate an integral first step of the disciplinary process which would not have otherwise occurred.

In arguing that RSs are not statutory supervisors, Petitioner relies upon the Board's recent decision in *DIRECTV U.S.*, 357 NLRB No. 149, slip op. at 1 (2011). In *DIRECTV U.S.*, the Board overturned a hearing officer's finding that an employer's field supervisors were not statutory supervisors. The field supervisors in that case had the authority to initiate the disciplinary process by drafting an "employee consultation form" (EFC). The EFC itself, and its content, were then subject to management review. In that case, after the field supervisors submitted a draft EFC, an operations manager, a site manager, and the human resources department each reviewed the EFC. At each stage of review, the reviewer could alter the language of the EFC, modify the level of discipline, or decide that the EFC should not itself be issued. Following such a review process, in those instances where discipline was deemed to be

warranted, field supervisors would meet with the employee, discuss the EFC, and afford the employee an opportunity to set forth his version of events. *Id.* at 2.

The facts in the instant case are distinguishable from those in *DIRECTV U.S.* Though the OBNs prepared by the Employer's RSs are, like the EFCs in *DIRECTV U.S.*, reviewed for the purpose of determining the level of discipline that should be imposed, the nature and degree of such review distinguishes the two systems. In the instant case, the first review of the OBN is conducted by the Night Manager, though such review is solely and simply for the purpose of entering them into the Employer's database before forwarding the OBN to the AS Supervisor. The AS Supervisor's review of the OBN is limited, as well. The facts and determinations set forth by the RS, as well as the merits of the infraction cited by the RS, are not independently investigated by the AS Supervisors.

While the Board has held that purely reportorial functions are not effective recommendations of discipline, it has clarified that the duty to report infractions is purely reportorial *only* where the employer then conducts its own investigation and decides, what if any, discipline to impose. See *Los Angeles Water and Power Employees' Association*, 340 NLRB 1232, 1234 (2003). The record in the instant case shows that OBNs issued by the Employer's RSs go beyond merely a reporting function. RSs exercise independent judgment in determining when and under what circumstances an operator should be issued an OBN. Moreover, the RSs' judgment, as reflected in the RSs' determination of the facts as set forth in the OBN, is not reviewed or further investigated by the Employer.

In fact, the record evidence, taken as a whole, shows that OBNs constitute a necessary and integral first step of the discipline meted out to employees. See *Oak Park Nursing Care Center*, 351 NLRB 27, 28 (2007) (the Board, citing *Promedica Health Systems*, 343 NLRB 1351 (2004), *enfd.*, in relevant part 206 Fed Appx. 405 (6th Cir 2006), *cert denied* 549 U.S. 1338 (2007), held that supervisory status was established where a foundation for future discipline was laid by an individual's independent action).

In addition to the authority used in issuing OBNs, the record also establishes that RSs exercise broad discretion when using their authority to remove operators who they suspect are under the influence of drugs or alcohol. Utilizing the "reasonable suspicion" training they receive from the Employer, RSs have and exercise broad discretion in determining to remove operators without prior authorization from upper management. Where such instances do occur, RSs notify BOC *after* the operator has been removed so as to avoid service interruptions.

2. Rewarding Operators

In addition to issuing OBNs for infractions committed by operators, RSs are authorized to, and do, issue OBNs in the form of a "Pat on the Back" (POB) to recognize employees for going "above and beyond" their regular duties. When this occurs, RSs mark the OBN as being a POB and document the event and circumstance which gave rise to the POB. Operators who receive a POB may be recognized by the Employer in the form of a monetary award, generally consisting of \$100, a plaque, and a letter of recognition. Once issued, AS Supervisors review the submitted POBs and select one or several employees from the pool of submitted POBs.

While the POBs issued by RSs do not always result in the recognition of operators in the manner described above, the issuance of a POB serves as a nomination for an On the Spot award that enters the employee into a pool of employees eligible for a POB. Only those employees who are recognized by a POB are eligible to be rewarded with an On the Spot award, which includes monetary incentives. By issuing a POB, RSs exercise independent judgment in recommending what conduct and which employee should be rewarded. The effect of each RS's POB is evident by the direct link between the issuance of a POB and an On the Spot award which directly affects the wages of those employees who receive it. Cf. *Elmhurst Extended Care*, 329 NLRB 535, 537 (1999).

3. Secondary Indicia

In addition to the indicia expressly listed under Section 2(11), non-statutory indicia can be used as background evidence in determining supervisory status. See *Training School of Vineland*, 332 NLRB 1412 (2000); *Chrome Deposit Corps.*, 323 NLRB 961, 963 fn. 9 (1997). While the Board has held that secondary indicia alone does not establish supervisory status in the absence of the primary indicia set forth in Section 2(11), the Board has nonetheless held that secondary indicia such as higher pay, supervisor to non-supervisor ratios, and attendance at supervisor meetings may bolster evidence which demonstrates that individuals otherwise exercise one of the primary indicia. See *Ken-Crest Services*, 335 NLRB 777, 779 (2001); *Marian Manor for the Aged & Infirm*, 333 NLRB 1084 (2001).

In addition to the primary indicia discussed above, RSs possess several secondary indicia of supervisory status. For instance, the record establishes that RSs wear different uniforms which distinguish them from operators and identify them as "supervisors." RSs are issued e-mail accounts and given access to computers, unlike operators, so as to allow them to communicate with management about policies, procedures, and safety issues. In addition, RSs attend management meetings where policies, procedures, safety issues, and upcoming events which affect the Employer's operations are discussed. These meetings are exclusively attended by members of management and RSs.

The record also shows that there are four AS Supervisors and four Senior RSs. The parties stipulate, and the record shows, that the Employer's AS Supervisors and Senior RSs are statutory supervisors tasked with overseeing the work of the approximately 750 operators. If, as the Petitioner argues, RSs are not statutory supervisors, the only immediate supervisors for approximately 750 operators would be the four AS Supervisors and the four Senior RSs. Such a scenario would result in an employer-to-supervisor ratio of approximately 94 to 1, a ratio which the Board has repeatedly held to be disproportionate. See *The Bama Company*, 145 NLRB 1141, 1143, fn. 6 (1964); *Formco, Inc.*, 245 NLRB 127, 128 (1979). The disproportionately high ratio which would result from a finding that RSs are rank-and-file employees further supports the conclusion that RSs are supervisors within the meaning of Act.

Based on the foregoing and the record in this proceeding, I find that the Employer's RSs are supervisors within the meaning of Section 2(11) of the Act. Accordingly, I shall dismiss the petition.

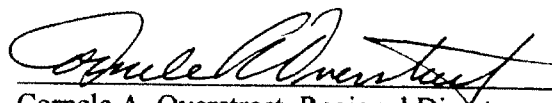
ORDER

IT IS HEREBY ORDERED that the petition filed in this matter be, and the same hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by February 16, 2012. The request may be filed electronically through E-Gov on the Agency's website, www.nlr.gov, but may not be filed by facsimile.⁴

Dated at Phoenix, Arizona, this 2nd day of February 2012.



Cornele A. Overstreet, Regional Director
National Labor Relations Board
Region 28
2600 North Central Avenue, Suite 1400
Phoenix, Arizona 85004

⁴ To file the request for review electronically, go to www.nlr.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Board/Office of the Executive Secretary** and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the Submit Form button. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's web site, www.nlr.gov.

EXHIBIT B

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

**VEOLIA TRANSPORTATION
SERVICES, INC.,**

and

**AMALGAMATED TRANSIT
UNION, LOCAL 1637, AFL-CIO**

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Case No. 28-RC-071479

PETITIONER'S POST-HEARING BRIEF

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ISSUE

Are Employer's road supervisors "supervisors" within the meaning of the National Labor Relations Act?

STIPULATION AS TO UNIT

The parties have stipulated that all full time and regular part-time road supervisors, also known as transit supervisors, employed by the Employer as its facility located at 3210 Citizen Avenue, North Las Vegas, Nevada are appropriately in the unit, should the NLRB assert jurisdiction. The parties have stipulated that all other employees, foremen, parts supervisor, senior customer service supervisors, vehicle support supervisors, senior safety systems supervisors, safety systems supervisors, senior planning supervisors, assistant transit supervisors, safety and training supervisors, senior supervisors, senior BOC supervisors, maintenance supervisors, office clerical employees, guards and all supervisors, as defined by the Act, are excluded from the unit. (Tr. 12:1-17.)¹

STATEMENT OF FACTS

I. Background

a. Veolia Transportation Services, Inc.

Veolia Transportation Services, Inc. ("the Employer" or "Veolia") operates a public transportation system for Las Vegas, Henderson, and North Las Vegas. (Tr. 18:20-23.) The Employer operates buses, also referred to as coaches, and provides fixed route bus service, pursuant to its contract with the Regional Transportation Commission (RTC). (Tr. 18:24-25;

¹ Citations to the certified transcript of the hearing that took place from January 9th through January 17, 2012 will be abbreviated as "Tr." for transcript, followed by the page(s) and then line number(s) on which the relevant testimony appears. For example, "Tr. 12:1-17" cites the testimony that appears on lines 1 through 17 of page 12 of the transcript.

19:1-3; 28:9-17.) A fixed route bus system is one which has a fixed schedule and set locations where the buses stop to pick up and drop off passengers. (Tr. 28:18-23.)

The highest ranking official who works on site for Veolia is Larry Kucera, the General Manager. (Tr. 43:21-23; CX-7.)² Kucera oversees Veolia's managers. (Tr. 44:3-6.) The next highest ranking official is the Director of Transportation; however, that position is currently vacant. (Tr. 44:7-15; CX-7.) Below the Director of Transportation in the management hierarchy is the Manager of Training, Ted Nelson, the Field Supervision Manager, Trevor Halleran, the Bus Operations Center (BOC) (also known as CATCOM) Manager, Ryan Neale, and the Operations Manager, Brian Van Hine. (CX-7; Tr. 17:9-11; 44:16-24.) The next highest ranking official is the Night Operations Assistant Manager, Mariann Kastner. (Tr. 44:25-45:1-2; CX-7.) The next level of supervision is the managers. (Tr. 45:3-5.) The managers oversee the Senior Supervisors, the BOC Seniors, the Planning Senior, dispatch and scheduling. (Tr. 45:6-11.) Senior Supervisors are located below managers in the hierarchy. (Tr. 46:2-8; CX-7.) The Senior Supervisors oversee the road supervisors.³ (Tr. 51:3-4.)

Currently, the Employer has two facilities: the Simmons facility (sometimes referred to as "IBMF") and the Sunset facility. (Tr. 24:8-17.) Coach operators are assigned to one of those two facilities⁴ based on the route on which they've bid. (Tr. 24:18-22.) Most of the Employer's administrative offices are located at the Simmons facility. (Tr. 25:16-18.)

² Citations to Employer's exhibits will be abbreviated as "CX-" followed by the exhibit number. Citations to the Union's exhibits will be abbreviated as "UX-" followed by the exhibit number.

³ Road supervisors have also been known as "transit supervisors" and "transit services supervisors." (Tr. 585:11-16.)

⁴ Each facility is also referred to as a "yard." (See e.g., Tr. 859:6.)

b. *Amalgamated Transit Union Local 1637*

The Employer's coach operators are represented by the Amalgamated Transit Union (ATU) Local 1637 ("the Union"). (Tr. 21:10-15.) The Union is also the exclusive bargaining representative for the Employer's Mechanics (A, B, C), Body Mechanics (A, B, C), Service Workers, and Parts Clerk/Specialists. (CX-2, at p.6, section 4.1.)

c. *Job Titles and Duties*

i. **Coach Operator**

Currently, Veolia employs approximately 750 buses drivers, also referred to as coach operators. (Tr. 19:15-17.) Coach operators are responsible for the safe operation of the coaches; they are assigned to a route and pick up passengers and drop them off at bus stops. (Tr. 20:23-25; 21:1-3.) Each day coach operators report to dispatch at either the Simmons or Sunset facility where they are assigned a coach. (Tr. 24:23-25; 25:1.)

ii. **Dispatch**

Dispatch is where the coach operators check into work. (Tr. 31:20-23.) The dispatchers are responsible for all of the timekeeping for the coaches and coach operators. (Tr. 31:23-24.) Dispatch also maintains the "See Senior" list, which is a list of coach operators that need to go see a Senior Supervisor. (Tr. 336:3-17.) If a coach operator checks into dispatch and his name is on the "See Senior" list, dispatch will send that coach operator to see a senior supervisor. (Tr. 336:3-17.)

iii. **Bus Operations Center ("BOC")**

The Bus Operations Center ("BOC"), according to Mr. Neale, Veolia's current BOC manager, is a cross between a 911 call center and air traffic control center. (Tr. 40:9-12; 41:16-19.) BOC handles any calls from coach operators, mechanical issues, incidents, accidents, and

any issues involving the routes. (Tr. 40:12-14.) BOC⁵ also tracks service through its computer system which determines if a bus is running late, early or on time. (Tr. 40:14-16.) BOC Seniors are in charge of the bus operations center; they direct the radio operators and dispatch the road supervisors. (Tr. 45:12-15.)

Coach operators who have an issue on their bus or need assistance contact BOC via their automated mobile data terminal (AMDT). (Tr. 40:19-24.) BOC receives the communication from the operator on its computer system and then BOC calls the coach operator directly. (Tr. 40:21-25; 41:1.) BOC then dispatches road supervisors, Senior Supervisors, law enforcement, and/or medical and fire personnel as needed. (Tr. 41:2-9.)

iv. Senior Supervisors

There are two types of Senior Supervisors: administrative senior supervisors and senior road supervisors. (Tr. 46:2-8; CX-7.) Currently, there are four administrative senior supervisors; two administrative senior supervisors are located at the Sunset facility and the other two are located at the Simmons facility. (Tr. 46:14-16; 17-19.) There will be a fifth administrative Senior Supervisor; he is currently in training. (Tr. 46:16; 50:14-19.) Administrative senior supervisors are responsible for administering discipline to coach operators. (Tr. 46:20-24.)

Currently, Veolia has four senior road supervisors. (Tr. 50:20-23; CX-7.) The senior road supervisors are referred to as field seniors; they are more directly responsible for the road supervisors than the administrative senior supervisors. (Tr. 51:1-4.) The senior road supervisors, or field seniors, conduct briefings with the road supervisors and pass information along to the road supervisors. (Tr. 51:4-7.)

⁵ Another slang term for BOC is the radio room. (Tr. 40:17-18.)

v. **Road Supervisors**

Currently, Veolia employs approximately 40 road supervisors. (CX-11.)⁶ Road supervisors are primarily responsible for responding to calls they receive from BOC and supporting the coach operators. (Tr. 776:3-5; 54:13-15.) Road supervisors do not have a specific number of coach operators assigned to them, however. (Tr. 770:3-5.) Nor are they responsible for a certain number of coach operators. (Tr. 952:19-21.) Rather, road supervisors are assigned to geographic work areas, for example, the northwest zone, southwest zone, northeast zone or southeast zone. (Tr. 770:11-12; 16-19.) Road supervisors have no way of telling how many coach operators are in their work area at any given time. (Tr. 770:13-19.)

During the early morning shifts, road supervisors assist with pull-outs from the yard. (Tr. 775:14-16.) Later in the day, road supervisors are either stationed at a terminal or are mobile and travel around by van. (Tr. 775:17-21.) Road supervisors who are mobile serve as “first responders.” (Tr. 775:21-24.) They respond to any situations that are interrupting service, for example, a broken fare box or minor mechanical issues with a bus. (Tr. 775:21-25; 776:1-3; 54:19-20.)

Road supervisors are also dispatched to accidents by BOC where they are required to fill out an accident kit that is supplied to them by the Employer. (Tr. 888:19-25; 889:1-7.) As part of that accident kit, road supervisors are required to collect data. (Tr. 930:5-11.) Specifically, road supervisors collect witness comment cards that have already been passed out to, and filled out by, passengers. (Tr. 930:17-19.)⁷ Road supervisors also ask the coach operator and passenger witnesses, if any, what occurred and then documents their statements verbatim. (Tr.

⁶ The road supervisors are referred to as “transit supervisors” on that exhibit. (CX-11.)

⁷ Current road supervisor Thomas testified that she then reads each and every one of those comment cards to the BOC senior, who then gives all of that information to the safety department, so that they can determine what to do next. (Tr. 930:23-25; 931:1-4.)

931:6-8.) At the accident scene, road supervisors take a minimum of 16 pictures. (Tr. 888:19-22; 931:18-19.) They also are tasked with filling out the vehicle accident report by gathering facts and information, including drivers' license numbers. (Tr. 951:23-24; see also, CX-32.) Road supervisors are required to complete an accident checklist. (Tr. 761:1-4.)

Road supervisors do not determine who was at fault in the accident, however. (Tr. 762:4-7.) Nor are road supervisors asked for their opinion on whether the accident was preventable or non-preventable. (Tr. 762:8-14; 889:8-10; 951:25-952:1-2.) Rather, it is the Safety Department that determines whether an accident is deemed preventable (also referred to as "chargeable") or non-preventable (also referred to as "non-chargeable"). (Tr. 674:21-25-675:1-3; 675:10-12.)⁸ A preventable (or chargeable) accident results in discipline; a non-preventable (or non-chargeable) accident does not. (Tr. 675:4-9.) Road supervisors do not have the discretion or authority to determine which accidents are preventable and therefore will result in discipline. (Tr. 676:11-18.)

Road supervisors also observe operators en route to make sure they are operating their coaches safely. (Tr. 54:15-17.) If a road supervisor observes a coach operator driving in an unsafe manner, however, he or she can pull the bus over but has to clear it with BOC. (Tr. 862:3-6; 889:11-14.)⁹ The road supervisors call BOC for direction. (Tr. 863:9-10.) It is BOC that makes the determination of what to do with the operator. (Tr. 762:19-12.)

Road supervisors also respond to biohazards on the buses. (Tr. 775:25-776:1.) A biohazard includes vomit, feces, or urine on the bus; road supervisors are called by BOC to report to the bus and clean the biohazard, if possible. (Tr. 899:2-8.) If the hazard is small

⁸ It is also the safety department, not the road supervisor that gets the police report, if any, following an accident and reviews it. (Tr. 673:16-20.)

⁹ Jackson testified that as a road supervisor, if she sees a coach operator she thinks may be under the influence, she has to get permission from BOC before she can pull that driver over. (Tr. 952:3-5.)

enough for the road supervisor to clean in the field, he or she will do so. (Tr. 899:11-12.) If not, it's sanitized and the road supervisor places a bio bag on the fare box and BOC sends the bus back to the yard. (Tr. 899:12-14.) Road supervisors are instructed that biohazards that are bigger than a football are too much to clean up in the field. (Tr. 899:15-18.)

Road supervisors do not approve time off for coach operators. (Tr. 953:3-5.) Nor do they write up coach operators for attendance infractions. (Tr. 953:6-8.) Coach operators do not call a road supervisor if they are going to be late for their shift or if they're not coming to work at all. (Tr. 952:22-25; 952:1-2.)

2. The Employer Learns of the Union's Efforts To Organize the Road Supervisors.

a. *The union notifies the employer of the road supervisors' support for union representation and requests recognition.*

It is undisputed that on December 20, 2011, the Union informed Veolia that it had the necessary level of support from the road supervisors and asked the Employer for recognition. Specifically, Jeffrey Raske, the Financial Secretary and Treasurer of the Union, testified he was present at the meeting with Veolia management on December 20, 2011. (Tr. 1087:7-11; 18-20.) Raske testified that at the end of that meeting, he held up sign-up cards for road supervisors to join the Union and asked if Veolia would stipulate that road supervisors become members of the bargaining unit. (Tr. 1087:24-25; 1088:1-3.) Elin Fehr, Veolia's Human Resources manager, also present at the meeting on December 20, 2011, admitted that the Union held up the cards and represented they had more than the necessary 30%. (Tr. 568:12-18.) Veolia stated they would get back to the Union but never did. (Tr. 1088:4-8.) The Union filed the instant petition on December 28, 2011.

- b. *Immediately after receiving notification from the union of its intent to represent road supervisors, the employer began instituting changes to the road supervisors' job duties.*

After the Employer learned of the Union's intent to represent road supervisors, it began instituting changes to the road supervisors' job duties. Specifically, the Employer circulated a new observation notice (or "OBN") purportedly granting road supervisors the authority to recommend discipline, and sent road supervisors to interview training so that they could take part, *for the first time since 2003*, in hiring panels for new coach operators.

i. **New observation notice**

Observation notices (also referred to as "OBNs") are filled out by road supervisors to document what they have observed. (Tr. 743:4-10.) The observation notice asks only for the following: date, name, title, coach #, route #, run #, location, observation, operator's signature and date, and the supervisor's signature and date. (CX-10.)¹⁰ The observation notice also explicitly states, "A copy of this Observation will be forwarded to the Senior Transportation/Operations Supervisor for Review." (CX-10.)

On December 30, 2011, *ten days after* the Union notified the Employer of its intent to represent road supervisors, Veolia's Field Supervision Manager, Trevor Halleran, issued a memorandum to road supervisors regarding anew observation notice procedure. (UX-2.) In that memorandum, Halleran notified road supervisors that, when completing an observation notice, they should cite the contract article and/or rule that has been violated and recommend what the next disciplinary step should be. (UX-2.)

¹⁰ While the Employer attached an "OBN/POB disposition" form to CX-10, that form is not part of the observation notice. (Tr. 744:11-22.) The current road supervisors testified they rarely, if ever, receive the "OBN/POB disposition" form and, as such, do not know whether the observation notice led to any action by the Employer. (Tr. 746:18-21; 885:14-25; 886:1-9.)

Attached to Halleran's December 30, 2011 memorandum was Veolia's revised observation notice form. (UX-2.) The revised form differs drastically from the former observation notice form. (Tr. 748:11-19; see also, CX-10, UX-2.) Specifically, the new observation notice form includes a space for "discussion with operator." (UX-2.) The revised observation notice form also includes a section for "supervisor recommended corrective action." (UX-2.)¹¹ The revised observation notice states road supervisors can issue discipline; this is new, as road supervisors have never been able to issue discipline, nor have they been trained to give discipline. (Tr. 748:15-19.)

The revised observation notice also includes a section for "senior supervisor comments/instructions" which, the form states, is "only applicable if further corrective action [is] recommended." Under that section, a senior supervisor checks whether he either agrees with the recommendation for corrective action as recommended by the supervisor, or disagrees with the recommendation and then is tasked with stating his reasons for doing so. (UX-2.)

Current road supervisor Marcella Jackson testified she learned of the new observation notice from Operations Manager Trevor Halleran. (Tr. 950:2-5.) Halleran handed Jackson a memorandum regarding the observation notice and stated it would give her the authority to discipline. (Tr. 950:6-10.) Jackson, Myers and Thomas testified that the new observation form is not currently in use. (Tr. 950:11-12; 887:25; 888:1-2; 747:24-25; 748:1.)

¹¹ Under that section, a road supervisor purportedly has a choice to check one of two options: The first states, "I have discussed the above observation with the operator, and if same type of observation has not been recently recorded, I recommend that no further action be taken; the provided positive counseling is sufficient to resolve the situation and does not require further discipline under the progressive discipline system." The other states, "I recommend further corrective action be administered; in accordance with _____, I recommend the following: _____." (UX-2.)

ii. **Hiring panels and interview training**

Veolia's Human Resources Manager, Elin Fehr, admitted that road supervisors have not participated in the hiring process for coach operators since 2003. (Tr. 556:9-14.) On December 23, 2011, *three days after* the Union notified the Employer of its intent to represent road supervisors, however, Fehr sent an email announcing a new interview process for coach operators involving road supervisors. (Tr. 565:5-12; 570:13-17; CX-57, CX-58.)

Current road supervisor Ila Myers testified that Veolia trained her on Tuesday, January 3, 2012 or Wednesday, January 4, 2012 on the new hiring panel process. (Tr. 740:2-9.) The Employer notified Myers only a few days prior to the training. (Tr. 740:14-17.) During that training, Veolia gave Myers a list of ten questions to ask potential operators and was told to stick to those questions. (Tr. 741:1-10.) Likewise, road supervisor Susan Thomas testified that Veolia had her attend a 45-minute training in the hiring or interview panel process on or around January 4, 2012. (Tr. 882:14-20.) Veolia notified her of the training that same day. (Tr. 882:23-25.) Marcella Jackson testified, however, that she has not been trained in the hiring or interview process as a road supervisor. (Tr. 947:2-4.)

3. Facts Regarding 2(11) Indicia.

a. *Road Supervisors Do Not Hire or Effectively Recommend Hire.*

i. **Road supervisors do not hire.**

Three current road supervisors (Ila Myers, Susan Thomas, and Marcella Jackson)¹² and one former road supervisor (Kenneth Green)¹³ testified at the hearing about their duties and

¹² Myers has been a road supervisor since April 2008. (Tr. 738:7-11.) Thomas has been a road supervisor for four (4) years. (Tr. 880:25; 881:1.) Jackson has also served as a road supervisor for Veolia for approximately four (4) years. (Tr. 945:5-8; 12-16.)

responsibilities as road supervisors. All four testified that as road supervisors they have never hired anyone. (Tr. 650:5-9; 738:7-11; 739:22-23; 880:25-881:1; 881:21-22; 946:20-21.)

ii. Road supervisors do not effectively recommend hire.

The Company failed to present any evidence that a road supervisor has ever effectively recommended that someone be hired. Thomas testified she was once on an interview panel for a road supervisor approximately three years ago; however, she did not have the final say on whether or not that road supervisor got hired. (Tr. 881:23-25; 882:1-5; 910:5-7.) Thomas testified that her role at that interview was to ask three or four questions that were already written down on a piece of paper. (Tr. 910:15-25; 911:1-3.) Nobody asked her for her feedback on whether or not the individual should be hired. (Tr. 911:4-8.) Rather, the two senior supervisors with her on the panel (Kelvin Manzanares and Robert Hiatt) referred the applicant to Trevor Halleran for another interview and he made the hiring decision. (Tr. 882:3-11; 911:13-15.)¹⁴

b. Road Supervisors Do Not Transfer or Effectively Recommend Transfer.

Green, Myers, Thomas, and Jackson testified that as road supervisors they have never transferred anyone. (Tr. 650:16-19; 741:11-13; 883:7-9; 947:5-7.) Thomas, Myers and Jackson testified they lacked the authority to do so as road supervisors. (Tr. 741:11-15; 883:10-11; 947:8-9.) The Employer failed to present any evidence whatsoever that a road supervisor has

¹³ Green testified on behalf of the Employer about his current role as a senior operations supervisor. (Tr. 631:1-5.) Green also testified about the time he served as a road supervisor for Veolia, however. Green served as a road supervisor from June 2010 to October 2011. (Tr. 650:5-7.)

¹⁴ Thomas' testimony is consistent with Elin Fehr's testimony and the Company's Exhibit 89. Ms. Fehr also testified that Kelvin Manzanares and Robert Hiatt were interviewers. (Tr. 1136:15-19.) Ms. Fehr testified that she was not present at the interview, however. (Tr. 1136:20-21.) Thus, she testified that she does not know who checked the "recommended for hire" box under "overall evaluation" on the interview evaluation form. (Tr. 1136:22-24; CX-89.) Thomas credibly testified that the two senior supervisors referred the applicant for a further interview and nobody asked for her feedback. (Tr. 882:3-8; 911:4-8.) Neither Kelvin Manzanares nor Robert Hiatt testified at the hearing.

ever transferred anyone or has the authority to do so. Nor did the Employer present any evidence that road supervisors effectively recommend transfer.

c. *Road Supervisors Do Not Suspend or Effectively Recommend Suspension.*

Green, Myers, Thomas, and Jackson all testified that as road supervisors they have never suspended anyone. (Tr. 650:20-21; 741:16-17; 883:12-13; 947:10-11.) Further, Myers, Thomas, and Jackson testified they lack the authority to do so. (Tr. 741:18-19; 883:14-15; 947:12-13.) The Employer failed to present any evidence that a road supervisor has ever suspended anyone or effectively recommended suspension. The Employer offered eleven (11) notices of suspension into evidence at the hearing. (CX-38; CX-40; CX-53; CX-67; CX-71; CX-72, pp. 26, 64, 74, 79, 89, and 93.)¹⁵ None of those suspensions were approved or signed off on by a road supervisor.¹⁶ (*Id.*) Nor do any of the suspension notices evidence that a road supervisor ever recommended suspension. (*Id.*)

d. *Road Supervisors Do Not Lay Off or Effectively Recommend Lay Off.*

Green, Myers, Thomas, and Jackson each testified that as road supervisors they have never laid anyone off. (Tr. 650:20-21; 741:20-21; 883:16-17; 947:10-11.) Myers, Thomas and Jackson testified they lack the authority to do so as road supervisors. (Tr. 741:22-23; 883:18-19; 947:12-13.) The Employer failed to present any evidence that a road supervisor has ever laid anyone off or effectively recommended layoff.

¹⁵ Of those eleven (11) notices of suspension, however, four (4) explicitly state the suspensions were waived by the senior supervisor who issued the discipline. (See, CX-53; CX-72, pp. 64, 74, and 79.)

¹⁶ In fact, all three (3) of those eleven (11) notices referencing accidents explicitly state that it was the Safety Department, not a road supervisor, who determined the accident in question (which led to the suspension) was preventable. (See, CX-67; CX-71; CX-72, p. 26.)

e. Road Supervisors Do Not Recall or Effectively Recommend Recall.

Green, Myers, Thomas, and Jackson testified that as road supervisors they have never recalled anyone. (Tr. 650:22-23; 741:24-25; 742:1; 883:20-24; 947:18-20.) Myers, Thomas and Jackson testified they lack the authority to do so as road supervisors. (Tr. 742:2-3; 883:25-884:1; 947:21-22.) The Employer failed to present any evidence that a road supervisor has ever recalled anyone or effectively recommended recall.

f. Road Supervisors Do Not Promote or Effectively Recommend Promotion.

Green, Myers, Thomas, and Jackson each testified that as road supervisors they have never promoted anyone. (Tr. 650:14-15; 742:4-6; 884:2-4; 947:23-25.) Myers, Thomas and Jackson testified they lack the authority to do so as road supervisors. (Tr. 742:7-8; 884:5-6; 948:1-2.) The Employer failed to present any evidence that a road supervisor has ever promoted anyone or effectively recommended promotion.

g. Road Supervisors Do Not Discharge or Effectively Recommend Discharge.

Green, Myers, Thomas, and Jackson each testified that as road supervisors they have never fired or discharged anyone. (Tr. 650:10-11; 742:9-10; 884:7-8; 948:3-4.) Myers, Thomas and Jackson testified they lack the authority to do so as road supervisors. (Tr. 742:11-12; 884:9-10; 948:5-6.) The Employer failed to present any evidence that a road supervisor has ever discharged anyone or effectively recommended discharge. In fact, Veolia's Human Resources Manager, Elin Fehr, testified that she receives recommendations for discharge from Senior Supervisors, not road supervisors. (Tr. 611:3-11.) Fehr testified that she must review and sign off on all terminations. (Tr. 611:2; 611:17-18.) In addition, all terminations must be signed off on by several other people, including the General Manager, Larry Kucera, and the Human Resources Regional Director, Phil Isaac. (Tr. 611:17-25; 612:1.) Thus, even Senior

Supervisors¹⁷ cannot terminate an employee without approval from human resources and others. (Tr. 612:8-9.)¹⁸

h. Road Supervisors Do Not Assign or Effectively Recommend Assignment.

Green, Myers, Thomas, and Jackson testified that as road supervisors they have never assigned new job duties, set schedules, or assigned anyone to work overtime. (Tr. 651:10-12; 742:13-21; 884:11-13, 16-18, 21-22; 948:7-9, 12-14, 17-19.) Thomas testified she lacks the authority to do so as a road supervisor. (Tr. 884:14-15, 19-20.) Likewise, Jackson testified that as a road supervisor she lacks the authority to assign new job duties or set the coach operators' schedules. (Tr. 948:10-11, 20-21.) By contrast, Jackson testified that she assigned overtime when she served as a "Supervisor 2"¹⁹ for Veolia but not as a road supervisor. (Tr. 948:12-16.)

i. Road Supervisors Do Not Reward or Effectively Recommend Rewards.

Green, Myers, Thomas, and Jackson all testified that as road supervisors they have never awarded anyone with a pay raise. (Tr. 650:24-25; 742:24-25; 743:1; 884:23-25; 948:22-24.) Myers, Thomas and Jackson testified they lack the authority to do so. (Tr. 743:2-3; 885:1-2; 948:25; 949:1.)

¹⁷ Senior Supervisors rank higher than road supervisors in the Employer's hierarchy. (Tr. 46:2-8; 51:3-4; CX-7.) In fact, Senior Supervisors are directly responsible for the road supervisors and are responsible for administering discipline to coach operators. (Tr. 46:20-24; 51:1-4.)

¹⁸ Senior supervisor Barry Goldsmith curiously testified to the contrary, however. Specifically, he testified that he needed Human Resources' approval "just for the paperwork." (Tr. 456:19-25; 457:1-4.) Later, however, Goldsmith admitted that he has to go to Human Resources to make sure that his recommended termination would be a proper one. (Tr. 457:11-13.)

¹⁹ Jackson testified that she served as a "Supervisor 2" for Veolia for approximately a year and a half or two years. (Tr. 945:17-18.) The "Supervisor 2" position was a promotion from road supervisor. (Tr. 945:12-13.) The "Supervisor 2" position was eventually eliminated and became the senior supervisor position. (Tr. 957:3-4.) As a "Supervisor 2" Jackson supervised a number of dispatchers, radio operators and road supervisors. (Tr. 956:1-3.) As a "Supervisor 2" she also checked timecards, authorized overtime, and granted vacation and PTO days. (Tr. 956:3-5.) After Veolia eliminated the "Supervisor 2" position, Jackson returned to her prior position as a road supervisor. (Tr. 945:7-13.) She remains a road supervisor today. (Tr. 945:5-6.)

1. “Pat on the Back”

Road supervisors can submit observation notices for a “pat on the back” for coach operators. (Tr. 636:10-11; 743:16-18.) Road supervisors issue a “pat on the back” to coach operators who have gone above and beyond and exhibited good customer service. (Tr. 636:10-16, 20-21.) Mr. Green testified that he did not exercise discretion in issuing coach operators “pats on the back,” as he simply did so if he saw them doing anything right within the Company’s policies and procedures and rules and regulations. (Tr. 637:14-21.) Those “pats on the back,” however, carry no monetary award or significance. (Tr. 752:8-14.) Moreover, Senior Supervisor Barry Goldsmith admitted that he is not aware of any pat on the back, or a large number of pats on the back, ever leading to the promotion of any coach operator. (Tr. 474:10-15.) The Company failed to present any evidence that a “pat on the back” has ever resulted in, or led to, promotion.

2. The “On the Spot” Award

An “on the spot” award goes to someone that has really gone over and above their job duties. (Tr. 753:9-10.) Recipients of the “on the spot” award receive a certificate. (Tr. 752:14-15.) While road supervisors can nominate coach operators for the “on the spot” award, road supervisors do not make the decision of who receives the award. (Tr. 749:2-7.) Rather, nominations are submitted to senior supervisors and management staff who determine who will receive the award. (Tr. 749:9-11.) Current road supervisor Myers testified that she has only nominated one person for an “on the spot” award since she became a road supervisor in April 2008. (Tr. 753:18-19.)

Current road supervisors Thomas and Jackson testified they have never nominated anyone for the “on the spot” award. (Tr. 918:22-24; 951:12-13.) Thomas testified that she does

not know if she has the authority to do so. (Tr. 918:25; 919:1-4.) BOC Manager Ryan Neale admitted that every “on the spot” award nomination does not result in the coach operator being awarded the “on the spot” award. (Tr. 302:1-4.)²⁰

j. *Road Supervisors Do Not Discipline or Effectively Recommend Discipline.*

i. **Road supervisors do not discipline.**

Road supervisors can issue observation notices (also referred to as “OBNs”); however, Green, Myers, Thomas, and Jackson all testified that an observation notice is just that – an observation notice, a document noting something the road supervisor has observed. (Tr. 649:21-23; 743:8-13; 885:7-13; 949:6-7.)

Observation Notices Are Not Discipline.

The Employer’s witness, Kenneth Green, currently a senior operations supervisor, admitted the observation notice is not discipline. (Tr. 649:19-22.) Moreover, Human Resources Director Elin Fehr testified that when the Union requests all discipline related to a particular coach operator, she does not supply observation notices regarding that coach operator. (Tr. 602:20-25.) Rather, the Employer produces written suspensions and conditions of employment. (Tr. 603:11-12.) Fehr testified, “We haven’t supplied the observation notices. I don’t know why. I can’t answer the question why, but we haven’t supplied that when they have requested.” (Tr. 603:13-19.) Moreover, the Employer presented no evidence that an observation notice, in and of itself, affects a coach operator’s job status or tenure.

²⁰ Yet, Neale also testified that senior supervisors “adopt” the recommendation of the road supervisors with respect to the “on the spot” award. (Tr. 241:18-20.) Clearly this cannot be true; if it were, every nomination by a road supervisor would result in an award. Thus, in order for the senior supervisor to determine if a coach operator receives the “on the spot” award or not, he or she must conduct an independent investigation.

a. *Road Supervisors Do Not Effectively Recommend Discipline.*

Green, Myers, Thomas, and Jackson all testified that they have never recommended discipline with the observation notice. (Tr. 645:13-22; 748:23-25; 749:1; 886:23-25; 949:18-20.) In fact, Green admitted that he did not believe he even had the authority to recommend discipline when he served as a road supervisor from June 2010 to October 2011. (Tr. 645:23-25; 646:1.)

i. **“Coaching” and “counseling” is not discipline.**

The Employer claims that road supervisors’ observation notices have led to “coaching” and “counseling” of coach operators by senior supervisors. “Coaching” and “counseling” are not discipline, however. The current “Disciplinary Notice” used by Veolia only references the following disciplinary options: “verbal warning,” “written warning,” “suspension,” “condition of employment,” and “termination.” (See, CX-67; Tr. 673:22-25; 674:1-5; 674:9-19.) Moreover, “coaching” and “counseling” is referenced in the parties’ collective bargaining agreement (CBA) with respect to attendance infractions only. (CX-2, p 13; Tr. 601:22-25; 602:1-12.) Road supervisors, however, do not have any involvement in attendance issues or discipline for attendance infractions. (Tr. 771:25; 772:1-4.)

ii. **The Employer conducts independent investigations and review.**

Even if “coaching” and “counseling” were discipline, Veolia conducts an independent investigation and review prior to deciding whether or not to administer “coaching” and “counseling.” The observation notice itself states, “A copy of this Observation will be forwarded to the Senior Transportation/ Operations Supervisor for Review.” (CX-10.) In fact, after a road supervisor submits an observation notice, it is reviewed by *at least* two (2) higher-ranking Company officials before the senior supervisor makes a decision whether or not to “coach” or “counsel” the bus driver. (Tr. 335:12-24; 642:2-6.) Specifically, all observation notices are first

sent to Mariann Kastner,²¹ Veolia's assistant operations manager, who reviews them and also reviews the coach operator's work history. (Tr. 465:1-3; 642:2-11.) Kastner then forwards the observation notices to the administrative senior supervisor. (Tr. 642:2-11.)

The senior supervisor then reviews the observation notice and speaks with the coach operator. (Tr. 505:17-18; 462:7-14.) During that time, coach operators are allowed to present their side of the story with respect to the observation notice. (Tr. 460:3-5.) Senior supervisor Barry Goldsmith admitted that during those discussions with coach operators he might learn new information he had not received from the road supervisor. (Tr. 462:7-14.) If the observation notice involved an accident or incident, then the senior supervisor reviews the accident/incident log in the operations control center for background information about the event. (Tr. 505:16-18; 545:20-24.)

The senior supervisors admit that they have rejected or discarded road supervisors' observation notices. (Tr. 458:9-12; 547:3-7.)²² In fact, the OBN/POB disposition form has a section which states, "The OBN was discarded due to the following reasons: _____." (See, CX-42; Tr. 458:20-25; 459:1-2.)

The senior supervisor also determines the level of discipline, if any, to administer to the coach operator. (Tr. 454:24; 467:15-17.) For example, Goldsmith testified that the Employer

²¹ Mariann Kastner did not testify at the hearing.

²² Senior supervisor Barry Goldsmith contradicted himself on this point. He first testified he relies on the road supervisors' observation notices 100% of the time; he then testified that he has rejected or discarded road supervisors' observation notices. (Tr. 432:19-25; 475:16-17; 458:9-12.) Goldsmith testified he doesn't really know how many observation notices he has rejected or discarded. (Tr. 459:3-5.) He testified that it would be safe to say he rejects an observation notice every six months. (Tr. 459:11-13.) When asked if he rejects observation notices more often than once every six months, he stated, "I couldn't say." (Tr. 459:14-15.) As a point of reference, however, in response to Veolia's counsel's direct examination questions, Goldsmith testified that he could remember what action he took with respect to a particular observation notice in 2001, eleven (11) years ago. (Tr. 413:2-25; 414:1-2; 424:14-16.)

has a “zero tolerance” policy for cell phone violations; yet, he decided to issue a one-day suspension and final warning to a coach operator who committed such an infraction. (Tr. 453:15-20.) Goldsmith testified that while he determined that the violation merited a one-day suspension and a final warning in that case, he had the discretion to recommend the coach operator be terminated. (Tr. 453:15-23; 454:24.) Goldsmith further testified he has discretion to determine if violations are “excessive” and decide the level of discipline. (Tr. 467:5-11.) In order to make that determination, Goldsmith admittedly seeks out and uses information outside of the observation notices. (Tr. 466:23-25; 467:1-9; 467:14-17.)

14. Road Supervisors Do Not Responsibly Direct Other Employees.

The Employer presented no evidence that road supervisors responsibly direct other employees.²³ In fact, witnesses at the hearing testified to the contrary. Goldsmith, who has worked for the Employer for approximately twenty (20) years testified that he “wouldn’t have any idea” how many employees road supervisors are in charge of. (Tr. 327:14-16; 469:19-24.) He testified that he doesn’t have any idea and could not even estimate how many coach operators that a road supervisor is in charge of. (Tr. 469:25; 470:1-4.) Moreover, the Employer failed to present any evidence that road supervisors are accountable for coach operators’ performance or lack thereof.

²³ Any argument by the Employer that its road supervisors must be statutory supervisors within the meaning of the Act because of the Employer’s contractual obligations with the RTC is unfounded and unpersuasive. Neither Veolia’s “Qualifications Proposal” to the RTC (CX-9) nor the Contract between the RTC and Veolia for Operation and Maintenance of Fixed Route Transit Services (UX-3) states road supervisors must meet the definition of supervisor under Section 2(11) of the Act. Nor does either exhibit state that the road supervisors possess any of the Section 2(11) indicia. See, CX-9, at pp. 22-23; UX-3. The Employer claims simply that its contract with the RTC requires that it staff one road/field supervisor for every twenty-eight (28) revenue vehicles in service at any given time. (*Id.*) It does not mandate road supervisors fit the statutory definition of “supervisor” for purposes of Section 2(11) of the Act. (*Id.*)

15. Road Supervisors Do Not Adjust Other Employees' Grievances.

The Company presented no evidence that road supervisors adjust other employees' grievances.

ARGUMENT

I. ROAD SUPERVISORS ARE NOT "SUPERVISORS" WITHIN THE MEANING OF THE NATIONAL LABOR RELATIONS ACT.

The Board exercises caution not to construe supervisory status too broadly because an employee who is deemed to be a supervisor is denied rights which the Act is intended to protect. *Avante at Wilson, Inc.*, 348 NLRB 1056, 1058 (2006). The burden to prove supervisory authority rests with the party asserting it. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006) (citing *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001)); *NLRB v. Bakers of Paris, Inc.*, 929 F.2d 1427, 1445 (9th Cir. 1991) ("[T]he burden of proving supervisory status rests on the party asserting it.") The party seeking to prove supervisory status must establish it by a preponderance of the evidence.²⁴ See, *Croft Metals, Inc.*, 348 NLRB 717, 721 (2006); *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003); *Bethany Medical Center*, 328 NLRB 1094, 1103 (1999).²⁵

²⁴ Section 2(11) of the Act defines a "supervisor" as

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

²⁵ This burden does not shift to the non-asserting party. "Rather, the party that asserts supervisory status retains the burden of proving that status by a preponderance of the evidence." *Loyalhanna Care Center*, 352 NLRB 863, 865 (2008) (stating that the Board has never held that the burden of going forward with evidence of supervisory status ever shifts to the non-asserting party).

Here, the Employer, as the party asserting supervisory status, has the burden to prove, by the preponderance of the evidence, that road supervisors²⁶ are “supervisors” within the meaning of the Act. As explained herein, the Company has failed to do so.

A. Road Supervisors Do Not Hire or Effectively Recommend Hire.

The Employer failed to prove that road supervisors hire. Three current road supervisors and one former road supervisor all testified at the hearing that as road supervisors they have never hired anyone. (Tr. 650:5-9; 738:7-11; 739:22-23; 880:25-881:1; 881:21-22; 946:20-21.) The Employer failed to present any evidence to the contrary.²⁷

The Employer also failed to prove, by a preponderance of the evidence, that road supervisors effectively recommend hire. The authority to “effectively recommend” an action “generally means that the recommended action is taken without independent investigation by supervisors, not simply that the recommendation is ultimately followed.” *Children’s Farm Home*, 324 NLRB 61, 61 (1997). Current road supervisor Susan Thomas served on an interview panel for a road supervisor approximately three years ago; however, she never made any recommendation regarding whether or not that person should be hired. (Tr. 881:23-25; 882:1-5; 910:5-7; 911:4-8.)²⁸ Rather, the two senior supervisors with her on the panel (Kelvin Manzanares

²⁶ The fact that road supervisors have the word “supervisor” in their title has no bearing on whether they meet the statutory definition. See, *Heritage Hall, EPI Corp.*, 333 NLRB 458, 458-59 (2001) (employees are not transformed into supervisors merely by virtue of their job titles or job descriptions).

²⁷ Veolia’s Human Resources Manager testified that road supervisors used to conduct one-on-one interviews with coach operators before the year 2003. (Tr. 556:9-12.) The Employer did not present any evidence, however, that those road supervisors actually made the hiring decisions. This lack of evidence is construed against the Employer, as it is the party asserting supervisory status. *Michigan Masonic Home*, 332 NLRB 1409, 1409 (2000). Moreover, even assuming, *arguendo*, road supervisors made hiring decisions approximately nine (9) years ago, such testimony would not be relevant to determine if road supervisors are statutory supervisors now.

²⁸ Nor did anyone ask for her opinion on whether or not the individual should be hired. (Tr. 911:4-8.) Her role at that interview was simply to ask three or four questions that were already written down on a piece of paper. (Tr. 910:15-25; 911:1-3.)

and Robert Hiatt) referred the applicant to Trevor Halleran for another interview and he made the hiring decision.²⁹ (Tr. 882:3-11; 911:13-15.) Thus, the Employer failed to prove Thomas even made a hiring recommendation, much less an “effective” one within the meaning of the Act.

On December 23, 2011, *three days after* the Union notified the Employer of its intent to represent road supervisors, Elin Fehr sent an email announcing a new interview process for road supervisors so that they may purportedly assist in the hiring of coach operators. (Tr. 565:5-12; 570:13-17; CX-57, CX-58.) The timing of the new interview process is suspect to say the least,³⁰ especially in light of the Employer’s admission that road supervisors had not been involved with interviewing potential new coach operators since approximately 2003. (Tr. 556:9-14.) Moreover, the Employer did not present evidence that road supervisors had effectively recommended hire since the new interview process began.³¹ The Employer’s contention that road supervisors will be able to effectively recommend hiring in the future is insufficient to establish they are presently “supervisors” within the meaning of the Act. See, *Ramona’s Mexican Food Products, Inc.*, 217 NLRB 867, 868 (1975) (employees being groomed for supervisory posts are not supervisors, since future assignments are at best speculative).

²⁹ Where, as here, the ultimate decision on personnel matters (including hiring) rests with someone other than the putative supervisor, the putative supervisor’s “recommendation” on hiring does not meet the requirements of the statute. *Cooper/T. Smith, Inc. v. NLRB*, 177 F.3d 1259, 1264 (1999); see also, *NLRB v. Security Guard Service, Inc.*, 384 F.2d 143, 148 (5th Cir. 1967) (the authority to make recommendations alone does not indicate supervisory status).

³⁰ See, *Dynasteel Corporation v. NLRB*, 476 F.3d 253, 258 (5th Cir. 2007) (recognizing an employer’s subterfuge to make it appear that an employee is a supervisor).

³¹ Elin Fehr admitted there has only been one panel with a road supervisor serving on it so far. (Tr. 605:10-14.) That interview panel occurred the day before Fehr testified at the hearing. (Tr. 605:15-16.) Fehr admitted no coach operators had been hired yet as a result of that interview panel. (Tr. 605:18-25.)

B. Road Supervisors Do Not Transfer or Effectively Recommend Transfer.

Green, Myers, Thomas, and Jackson testified that as road supervisors they have never transferred anyone. (Tr. 650:16-19; 741:11-13; 883:7-9; 947:5-7.) Thomas, Myers and Jackson testified they lacked the authority to do so as road supervisors. (Tr. 741:11-15; 883:10-11; 947:8-9.) The Employer failed to present any evidence to the contrary; as such, they have failed to prove road supervisors transfer or effectively recommend transfer. See, *Michigan Masonic Home*, 332 NLRB 1409, 1409 (2000) (lack of evidence is construed against the party asserting supervisory status).

C. Road Supervisors Do Not Suspend or Effectively Recommend Suspension.

Green, Myers, Thomas, and Jackson all testified that as road supervisors they have never suspended anyone. (Tr. 650:20-21; 741:16-17; 883:12-13; 947:10-11.) Further, Myers, Thomas, and Jackson testified they lack the authority to do so. (Tr. 741:18-19; 883:14-15; 947:12-13.) The Employer failed to present any evidence that a road supervisor has ever suspended anyone or effectively recommended suspension.³² As such, it failed to prove, by a preponderance of the evidence, that road supervisors suspend or effectively recommend suspension.

D. Road Supervisors Do Not Lay Off or Effectively Recommend Lay Off.

The Employer failed to present any evidence that a road supervisor has ever laid anyone off or effectively recommended layoff. See, *Michigan Masonic Home*, 332 NLRB 1409, 1409 (2000) (lack of evidence is construed against the party asserting supervisory status). Moreover, Green, Myers, Thomas, and Jackson each testified that as road supervisors they have never laid anyone off. (Tr. 650:20-21; 741:20-21; 883:16-17; 947:10-11.) Myers, Thomas and Jackson's

³² While the Employer offered eleven (11) notices of suspension into evidence at the hearing, none of those suspensions were approved, or signed off on, by a road supervisor. (CX-38; CX-40; CX-53; CX-67; CX-71; CX-72, pp. 26, 64, 74, 79, 89, and 93.) Nor do any of the suspension notices evidence that a road supervisor ever recommended suspension. (*Id.*)

uncontroverted testimony at the hearing is that they lack the authority to do so as road supervisors. (Tr. 741:22-23; 883:18-19; 947:12-13.)

E. Road Supervisors Do Not Recall or Effectively Recommend Recall.

The Employer failed to present any evidence that a road supervisor has ever recalled anyone or effectively recommended recall. See, *Michigan Masonic Home*, 332 NLRB 1409, 1409 (2000) (lack of evidence is construed against the party asserting supervisory status). Rather, Green, Myers, Thomas, and Jackson all testified that as road supervisors they have never recalled anyone. (Tr. 650:22-23; 741:24-25; 742:1; 883:20-24; 947:18-20.) Moreover, Myers, Thomas and Jackson testified they lack the authority to do so as road supervisors. (Tr. 742:2-3; 883:25-884:1; 947:21-22.)

F. Road Supervisors Do Not Promote or Effectively Recommend Promotion.

At the hearing, three current road supervisors and one former supervisor each testified that as road supervisors they have never promoted anyone. (Tr. 650:14-15; 742:4-6; 884:2-4; 947:23-25.) Myers, Thomas and Jackson testified they lack the authority to do so as road supervisors. (Tr. 742:7-8; 884:5-6; 948:1-2.) The Employer failed to present any evidence to the contrary. See, *Michigan Masonic Home*, 332 NLRB 1409, 1409 (2000) (lack of evidence is construed against the party asserting supervisory status).

G. Road Supervisors Do Not Discharge or Effectively Recommend Discharge.

The Employer did not present any evidence that road supervisors discharge or effectively recommend discharge. Green, Myers, Thomas, and Jackson each testified that as road supervisors they have never fired or discharged anyone. (Tr. 650:10-11; 742:9-10; 884:7-8;

948:3-4.) The uncontroverted testimony establishes road supervisors lack the authority to do so. (Tr. 742:11-12; 884:9-10; 948:5-6.)³³

H. Road Supervisors Do Not Assign or Effectively Recommend Assignment.

The Board has held that “assign,” for purposes of Section 2(11), means the “designation of significant overall tasks to an employee, not . . . ad hoc instruction that the employee perform a discrete task.” *Oakwood Healthcare*, 348 NLRB 686, 689 (2006). To establish the authority to assign, moreover, it must be shown “that the putative supervisor has the ability to *require* that a certain action be taken; supervisory authority is not established where the putative supervisor has the authority merely to *request* that a certain action be taken.” *Golden Crest Healthcare Center*, 348 NLRB 727, 729 (2006) (emphasis in original).

Here, however, three current road supervisors and one former road supervisor all testified that they have never assigned new job duties, set schedules, or assigned anyone to work overtime.³⁴ (Tr. 651:10-12; 742:13-21; 884:11-13, 16-18, 21-22; 948:7-9, 12-14, 17-19.)

³³ Veolia’s Human Resources Manager, Elin Fehr, testified that she receives recommendations for discharge from senior supervisors, not road supervisors. (Tr. 611:3-11.) Fehr testified that she must review and sign off on all terminations. (Tr. 611:2; 611:17-18.) In addition, all terminations must be signed off on by several other people, including the General Manager, Larry Kucera, and the Human Resources Regional Director, Phil Isaac. (Tr. 611:17-25; 612:1.) Thus, not even senior supervisors can terminate an employee without approval from human resources and others. (Tr. 612:8-9.)

³⁴ Senior Supervisor Barry Goldsmith testified road supervisors can authorize overtime for coach operators on the Deuce Line. Even assuming, *arguendo*, this is true, it is insufficient to prove road supervisors are “supervisors” within the meaning of the Act for several reasons. First, Goldsmith’s statement is a conclusory one. See, *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006) (“The Board has long recognized that purely conclusory evidence is not sufficient to establish supervisory status; instead the Board requires evidence that the employee actually possesses the Section 2(11) authority at issue. Second, assignment of overtime on one route does not constitute the designation of significant overall duties; at best it is a discrete task. *Oakwood Healthcare*, 348 NLRB 686, 689 (2006). Third, the Employer failed to present evidence that by “authorizing” overtime on the Deuce Line has the road supervisor has the ability to *require* a coach operator to work it, nor merely *request* that the coach operator does so. *Golden Crest Healthcare Center*, 348 NLRB 727, 729 (2006). Fourth, the Employer failed to prove road supervisors exercise independent judgment in making that assignment. See e.g., *Lynwood Manor*, 350 NLRB 489, 490 (2007). Finally, Goldsmith’s testimony is contradicted by the four road supervisors who testified they never assigned overtime to anyone.

Additionally, the current road supervisors testified that they lack the authority to do so. (Tr. 884:14-15, 884:19-20; 948:10-11, 20-21.)

I. Road Supervisors Do Not Reward or Effectively Recommend Rewards.

The Employer failed to prove, by a preponderance of the evidence, that road supervisors reward or effectively recommend rewards for coach operators. A reward, per Section 2(11) of the Act, is synonymous with a merit pay increase. See, *Trevilla of Golden Valley*, 330 NLRB 1377 (2000) (finding supervisor's evaluation had direct link to merit pay increase of up to 4%); see also, *Bayou Manor Health Center*, 311 NLRB 955 (1993) (finding direct correlation between supervisor's evaluation and merit pay increase of up to 5%).

Here, however, three current road supervisors and one former road supervisor all testified they have never awarded anyone with a pay raise. (Tr. 650:24-25; 742:24-25; 743:1; 884:23-25; 948:22-24.) Myers, Thomas and Jackson testified they lack the authority to do so. (Tr. 743:2-3; 885:1-2; 948:25; 949:1.) The Employer failed to present any evidence that road supervisors can reward coach operators with merit pay increases or effectively recommend the same.

While road supervisors can issue a "pat on the back" to a coach operator or nominate a coach operator for an "on the spot" award, neither constitutes a "reward" for purposes of the Act. A "pat on the back" is a written recognition that a coach operator has gone above and beyond and exhibited good customer service. (Tr. 636:10-16, 20-21.) A "pat on the back" has no monetary award or significance, however. (Tr. 752:8-14.)³⁵ As such, it is not a reward for purposes of the Act.

³⁵ In addition, Senior Supervisor Barry Goldsmith admitted that he is not aware of any pat on the back, or a large number of pats on the back, ever leading to the promotion of any coach operator. (Tr. 474:10-15.) The Company failed to present any evidence that a "pat on the back" has ever resulted in, or led to, promotion.

The “on the spot” award is also not a “reward” for purposes of the Act, as it does not result in a merit wage increase, but only a plaque for the coach operator and \$100 before taxes. (Tr. 75:20-24.) Moreover, the “On the Spot” award is a misnomer, to say the least; road supervisors do not and cannot award it on the spot. (Tr. 749:5-7.) Rather, road supervisors can only nominate a coach operator; their nomination is then reviewed by the senior supervisors and management staff who ultimately determine whether or not the coach operator merits the award. (Tr. 749:5-11.) Every “on the spot” award nomination does not result in the coach operator actually receiving the award. (Tr. 302:1-4.) Because the road supervisors’ recommendations for “on the spot” awards are independently investigated by superiors (as evidenced by the fact all nominations do not result in awards), road supervisors do not effectively recommend rewards. See, *Children’s Farm Home*, 324 NLRB 61, 61 (1997) (to “effectively recommend” an action “generally means that the recommended action is taken without independent investigation by superiors....”).

J. Road Supervisors Do Not Discipline or Effectively Recommend Discipline.

1. **Road supervisors do not discipline.**

The Employer has failed to prove that road supervisors can or do issue discipline.³⁶ Although there is testimony that road supervisors can counsel coach operators in the field

³⁶ The Employer introduced the decision in *Lucky Cab Company*, Case No. 28-CA-23508, dated December 28, 2011, as its first exhibit at the hearing and will undoubtedly rely in large part on that decision in its brief. (See, CX-1.) That case, however, is an ALJ decision that has not been reviewed by the Board and, as such, is not binding here. (CX-1.) Secondly, the ALJ in *Lucky Cab Company* does not cite, much less discuss the impact of *DirecTV*, 357 NLRB No. 149 which was decided by the Board on December 22, 2011. Had the administrative law judge in *Lucky Cab Company* considered the guidance offered by the Board in *DirecTV*, the result would have been different. Finally, there is a significant factual distinction between the supervisors in *Lucky Cab Company* and the road supervisors at issue in this case. In *Lucky Cab Company*, the supervisors had express authority to discipline and effectively recommend discipline. (CX-1, p. 6.) Specifically, the Employer’s handbook in *Lucky Cab Company* explicitly stated those road supervisors “have the direct authority to discipline employees up to and including issuing written warnings. Furthermore, through a reporting procedure [Assistant/Backup Road

regarding rule infractions, such actions do not vest road supervisors with supervisory authority. Giving instructions or minor orders to other employees within the confines of Employer guidelines does not confer supervisory status on the employee. *Franklin Home Health Agency*, 337 NLRB 836, 829 (2002). Moreover, while road supervisors can write observation notices (“OBNs”), observation notices are not discipline, as one of the Employer’s own witnesses admitted. (Tr. 649:19-22.)³⁷ Finally, the Employer presented no evidence that OBNs, in and of themselves, had any impact on any coach operator’s status or tenure with the Company.³⁸ See, *Willamette Industries*, 336 NLRB 743, 743-744 (2001) (a lead person’s documentation to report employee conduct and/or performance does not rise to the level of supervisory indicia if the evaluation does not affect employee status or tenure).

Additionally, the Employer’s anticipated argument that road supervisors exercise discretion in deciding whether to counsel a coach operator in the field or write an OBN is unpersuasive.³⁹ Any such “discretion” used by road supervisors in “deciding whether something is minor or major, which would then affect their decision whether to counsel, enforce an Employer policy, involve management and/or reduce incidents to writing is no more than minor,

Supervisors] can recommend further administrative action, up to and including termination, which in most cases will be followed.” (CX-1, p. 6.) There is no such evidence here. Also, in *Lucky Cab Company*, the Employer regularly based discipline on those road supervisors’ reports without conducting an intervening, independent investigation. *Id.* at p. 17. That too differs from the facts of this case. This case should be decided based on Board law (i.e., *DirecTV*), not an ALJ decision which is at odds with both current Board law and the facts of this case.

³⁷ Three current road supervisors and one former road supervisor all testified that an observation notice is just that – a documentation of something a road supervisor has observed. (Tr. 649:21-23; 743:8-13; 885:7-13; 949:6-7.)

³⁸ In fact, Elin Fehr admits the Employer does not even produce relevant OBNs to the Union in response to its request for all discipline related to particular coach operators. (Tr. 602:20-25.) Moreover, the Employer’s current “Disciplinary Notice” does not reference the observation notice as a disciplinary action or level. (See, CX-67; Tr. 673:22-25; 674:1-5; 674:9-19.)

³⁹ It is also irrelevant or moot, at best, given that neither OBNs nor counselings are discipline.

commonsense decision-making; it does not rise to the level of supervisory discretion.” *First Transit, Inc.*, Case No. 31-RC-8504, at p. 15; *Franklin Home Health Agency*, 337 NLRB 836 (2002).

2. Road supervisors do not effectively recommend discipline.

- a. No evidence road supervisors are vested with the authority to recommend discipline.

First, the observation notice form does not require, or even ask for, the road supervisor’s recommendation regarding discipline. (CX-10.) Moreover, in the context of accident investigations, it is undisputed that road supervisors do not and cannot make any recommendation or determination regarding who they believe is at fault in the accident or whether the accident was preventable or non-preventable. (Tr. 762:4-14; 889:8-10; 951:25-952:1-2.) Incident report forms that are filled out by road supervisors also do not request, much less require, that a road supervisor recommend discipline, if applicable. (CX-19.) It is also undisputed that road supervisors play no part whatsoever in attendance issues, including recommending discipline for attendance infractions. (Tr. 953:6-8.) Finally, the Employer failed to prove it granted road supervisors with the express authority to discipline and effectively recommend discipline.⁴⁰ See e.g., *Avante at Wilson, Inc.*, 348 NLRB 1056, 1056 (2006) (where one of the factors that the Board took into account in determining if staff nurses possessed supervisory authority with respect to disciplining certified nursing assistants (CNA) was whether the collective bargaining agreements covering the CNAs or the facility’s employee handbook

⁴⁰ Neither the Employer’s “Employee Handbook for Non-Represented Employees” (CX-25) nor its “Transit Services Supervisor Procedures” (CX-65) grant road supervisors the authority to discipline and effectively recommend discipline. The Employer introduced an undated, two-page typed document, not on Veolia letterhead, which it purports explains the road supervisors’ responsibilities with respect to observation notices. (CX-8.) The road supervisors who testified had never seen this document. (Tr. 648:22-25; 649:1-6; 754:12-15; 888:3-10.)

referred to sending employees home or ordering employees to leave the facility as disciplinary actions).

Tellingly, *after the present petition was filed*, the Employer advised road supervisors that they purportedly have the authority to recommend discipline on observation notices. (Tr. 950:6-10; UX-2.) The Employer even went so far as to revise its observation notice to include specific, new sections for the road supervisor's disciplinary recommendation. (UX-2.) The undisputed testimony at the hearing is that this new observation notice form is not currently in use. (Tr. 950:11-12; 887:25; 888:1-2; 747:24-25; 748:1.)⁴¹ The marked revisions to the observation notice form, as well as the timing of those revisions, however, speak volumes. If road supervisors already possessed the authority effectively to recommend discipline and had been previously told so, there would have been no reason to revise the observation notice form to include a road supervisor's recommendation section and to inform road supervisors that they (allegedly) have the authority to recommend and issue discipline.⁴² Rather, the revised observation notice represents a huge departure, as road supervisors have never been able to issue discipline, nor have they been trained to give discipline. (Tr. 748:15-19.)

⁴¹ Thus, if anything, Halleran's contention that road supervisors will be able to effectively recommend discipline (when the new observation notice form goes into effect) is insufficient to establish they are presently "supervisors" within the meaning of the Act. See, *Ramona's Mexican Food Products, Inc.*, 217 NLRB 867, 868 (1975) (employees being groomed for supervisory posts are not supervisors, since future assignments are at best speculative).

⁴² The revised observation notice form therefore smacks of subterfuge; an attempt by the Employer to make it appear road supervisors have supervisory authority when, in fact, they do not. See, *Dynasteel Corporation v. NLRB*, 476 F.3d 253, 258 (5th Cir. 2007) (recognizing an employer's subterfuge to make it appear that an employee is a supervisor).

b. No evidence that road supervisors recommend discipline.

Road supervisors do not “recommend” discipline.⁴³ The observation notice form does not ask for the road supervisor’s recommendation of discipline. (CX-10.)⁴⁴ Further, current and former road supervisors Green, Myers, Thomas, and Jackson all testified that they have never recommended discipline with the observation notice. (Tr. 645:13-22; 748:23-25; 749:1; 886:23-25; 949:18-20.)⁴⁵ In fact, Green admitted that he did not believe he even had the authority to recommend discipline when he served as a road supervisor from June 2010 to October 2011. (Tr. 645:23-25; 646:1.) The undisputed testimony therefore is road supervisors do not recommend discipline, much less an appropriate level of discipline.

c. Superiors Conduct Independent Investigations on all OBNs.

Even if observation notices could somehow be construed as recommendations of discipline by road supervisors, the Employer has still failed to prove road supervisors effectively recommend discipline. The authority to “effectively recommend” an action “generally means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed.” *Directv U.S. Directv Holdings LLC*, 357

⁴³ While the job description, dated 2007, states transit service supervisors “write preliminary notices of action for disciplinary purposes and “pat on the back” which are then reviewed by a Senior Supervisor” (CX-64), job descriptions or other documents suggesting the presence of supervisory authority are not given controlling weight, as the Board insists on evidence supporting a finding of actual as opposed to mere paper authority. *Golden Crest Healthcare Center*, 348 NLRB No. 39, slip op. at 5 (citing *Training School at Vineland*, 332 NLRB 1412, 1416 (2000)).

⁴⁴ By contrast in *Directv U.S. Directv Holdings LLC*, the field supervisors at issue had the authority to issue an employee consultation form (ECF) that identified an appropriate level of discipline. *Directv*, 357 NLRB No. 149 (December 22, 2011), fn. 4, at p. 2. Yet, the Board still found the field supervisors in *Directv U.S. Directv Holdings LLC* failed to meet the statutory definition of “supervisor.” (*Id.*, at p. 4.)

⁴⁵ The Employer’s own evidence supports this position. The Employer introduced approximately 133 observation notices (not including “pats on the back”) into evidence. (See, CX-34; 35; 36; 37; 38; 39; 40; 41; 43; 44; 45; 46; 47; 48; 49; 50; 51; 52; 53; 54; 55; 72; 76; 77; 78; 79; 92.) Not one includes a disciplinary recommendation by a road supervisor. (*Id.*) The observation notices span an eleven (11) year period of time. (*Id.*)

NLRB No. 149 (December 22, 2011), citing *Children's Farm Home*, 324 NLRB 61, 61 (1997).

Here, both prongs are lacking.

It is undisputed that every observation notice is reviewed by *at least* two (2) higher-ranking Company officials⁴⁶ before the senior supervisor makes a decision on what, if anything, to do.⁴⁷ (Tr. 505:17-18; 462:7-14; 642:2-6.) Specifically, all observation notices are first sent to Mariann Kastner,⁴⁸ Veolia's assistant operations manager, who reviews them and also reviews the coach operator's work history. (Tr. 465:1-3; 642:2-11.) Kastner then forwards the observation notices to the administrative senior supervisor. (Tr. 642:2-11.)

The senior supervisor then reviews the observation notice and speaks with the coach operator. (Tr. 505:17-18; 462:7-14; 491:1-4.) During that time, coach operators are allowed to present their side of the story with respect to the observation notice. (Tr. 460:3-5.)⁴⁹ Senior supervisor Barry Goldsmith admitted that during those discussions with coach operators he might learn new information he had not received from the road supervisor. (Tr. 462:7-14.) If the

⁴⁶ As such, the facts in this case are analogous to those in *DirecTV* where the field supervisors' employee consultation forms (ECFs) were all subject to multiple levels of review by superiors. *DirecTV U.S. Directv Holdings LLC*, 357 NLRB No. 149 (December 22, 2011), at p. 3. In *DirecTV*, the Board found the field supervisors were not supervisors within the meaning of Section 2(11) of the Act. *Id.* at p. 4.

⁴⁷ It is the senior supervisors, not the road supervisors, who take action as a result of the observation notice. In *DirecTV*, it was the field supervisors (whose supervisory status was at issue) that actually met with the employee to present and explain the employee consultation form (ECF). *DirecTV*, 357 NLRB No. 149, at p. 2 (December 22, 2011). Yet, the Board still found that the field supervisors did not discipline or effectively recommend discipline within the meaning of Section 2(11) of the Act. *Id.* at p. 4.

⁴⁸ Mariann Kastner did not testify at the hearing. The absence of evidence that Kastner accepts the observation notices as written and does not conduct an independent investigation warrants a conclusion that the road supervisors do not effectively recommend discipline. See, *DirecTV U.S. Directv Holdings LLC*, 357 NLRB No. 149 (December 22, 2011), fn. 11, at p. 3.

⁴⁹ For example, coach operator William Farmer testified that he has met with Senior Supervisors – specifically, Doug Vasquez and Kelvin Manzanares – about observation notices that have been written about him. (Tr. 1111:14-19; 1112:1-7.) Farmer testified he told them his side of the story. (Tr. 1112:8-11.) Farmer has had observation notices written about him that did not result in discipline. (Tr. 1111:24-25; 1112:1.)

observation notice involved an accident or incident, then the senior supervisor reviews the accident/incident log in the operations control center for background information about the event. (Tr. 505:16-18; 545:20-24.)

Second, road supervisors' observation notices are not always ultimately followed.⁵⁰ The senior supervisors admit that they have rejected or discarded road supervisors' observation notices. (Tr. 458:9-12; 547:3-7.)⁵¹ In fact, the OBN/POB disposition form has a section which explicitly states, "The OBN was discarded due to the following reasons: _____." (See, CX-42; Tr. 458:20-25; 459:1-2.) The fact that Senior Supervisors reject or discard road supervisors' observation notices further proves they conduct an independent investigation; after all, how would they have known whether to reject or discard the observation notice?⁵²

Based on the foregoing, even though road supervisors can report infractions by coach operators of the Employer's rules, this is insufficient to confer supervisory status because it does not lead to personnel action without review by others. *Artcraft Displays, Inc.*, 262 NLRB 1233, 1234-1235 (1982) (leadmen not supervisors even though they report employee problems to employer); *Knogo Corp.*, 265 NLRB 935, 935-936 (1982), enf.in relevant part 727 F.2d 55 (2d Cir. 1984) (leadpersons not agent of employer although she reported rule infractions or repeated

⁵⁰ Moreover, the road supervisors testified that they are rarely, if ever, told about the disposition of their observation notices. (See e.g., Tr. 746:20-21; 896:10-14.)

⁵¹ See, footnote 22, *supra*.

⁵² In response to their counsel's repeated leading questions, Employer's witnesses testified Senior Supervisors do not conduct an investigation on observation notices. (See e.g., Tr. 383:21-25; 384:1-9; 537:2-4; 697:4-16.) These statements are purely conclusory, however; "purely conclusory evidence is not sufficient to establish supervisory authority." *Loyalhanna Care Center*, 352 NLRB 863, 864 (2008); see also, *Lynwood Manor*, 350 NLRB 489, 490 (2007); *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006); *Golden Crest Healthcare Center*, 348 NLRB 727, 921 (2006). Moreover, they contradict the testimony that Senior Supervisors review the observation notice and speak with the coach operators, during which time, coach operators are allowed to present their side of the story. (Tr. 505:17-18; 460:3-5; 462:7-14; 491:1-4.) The fact Senior Supervisors reject or discard observation notices also belies their testimony that they do no investigation on observation notices.

incidents of poor performance by other employees where discipline was preceded by independent investigation). Because all observation notices are subject to review and investigation by superiors, the Employer has failed to prove road supervisors effectively recommend discipline.⁵³ See, *Mountaineer Park, Inc.*, 343 NLRB 1473 (2004) (A recommendation is “effective” if it is followed without further review.).

d. Senior Supervisors determine the level of discipline, if any, to administer.

Senior Supervisors determine the level of discipline, if any, to administer to coach operators. (Tr. 454:24; 467:15-17.) For example, Goldsmith testified that the Employer has a “zero tolerance” policy for cell phone violations; yet, he decided to issue a one-day suspension and final warning to a coach operator who committed such an infraction. (Tr. 453:15-20.) Goldsmith testified that while he determined that the violation merited a one-day suspension and a final warning in that case, he had the discretion to recommend the coach operator be terminated. (Tr. 453:15-23; 454:24.)

Goldsmith testified at another time he determined that a coach operator had an excessive amount of violations and decided to issue that operator a one-day suspension.⁵⁴ (Tr. 467:5-9.) Goldsmith admitted, however, that he could have issued the operator a two-day suspension if he wished to do so.⁵⁵ (Tr. 467:10-11.) Goldsmith admitted he determined the level of suspension

⁵³ Further, the Employer failed to prove that road supervisors exercise independent discretion in writing observation notices. For example, Mr. Green testified that in issuing observation notices to coach operators, he never deviated from the Company’s rules and regulations. (Tr. 638:8-14.) Rather, he testified that he kept strict adherence to the Company’s rules and regulations. (Tr. 638:12.) A current road supervisor also testified she was instructed to write more observation notices. (Tr. 934:16-20.) She also testified that she only fills out observation notices when told to do so by upper management. (Tr. 908:16-20.)

⁵⁴ Before he decided on the discipline, Goldsmith went through computer records to research the operators’ previous violations, which he deemed to be “excessive.” (Tr. 466:23-25; 467:1-9.)

⁵⁵ Goldsmith is not directed to provide a certain level of discipline. (Tr. 466:13-15.)

on his own; he admitted the road supervisor, Marcella Jackson, did not recommend or suggest a level of discipline. (Tr. 467:14-17.) Finally, where the Senior Supervisor determines discipline is warranted,⁵⁶ it is the Senior Supervisor, not the road supervisor, who issues that discipline.⁵⁷

K. Road Supervisors Do Not Responsibly Direct Other Employees.

The Board has interpreted the 2(11) language “responsibly to direct” as follows: “If a person on the shop floor has men under him, and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided that the direction is both responsible . . . and carried out with independent judgment.” *Oakwood Healthcare, Inc.*, 348 NLRB 686, 691 (2006) (internal quotations omitted). The Board further held that, for direction to be responsible under Section 2(11), the person directing the performance of a task must be accountable for its performance. *Id.* at 691–692.

The Employer presented no evidence that road supervisors responsibly direct other employees. In fact, witnesses at the hearing testified to the contrary.⁵⁸ Moreover, the Employer

⁵⁶ Some of the observation notices introduced by the Employer at the hearing, allegedly resulted in a Senior Supervisor administering “coaching” or “counseling” to the coach operator, if anything. (See, CX-34; 35; 36; 37; 38; 39; 40; 41; 43; 44; 45; 46; 47; 48; 49; 50; 51; 52; 53; 54; 55; 72; 76; 77; 78; 79; 92.) Coaching and counseling are not discipline, however. The current “Disciplinary Notice” used by Veolia does not reference “coaching” or “counseling” as a disciplinary action or level. (See, CX-67; Tr. 673:22-25; 674:1-5; 674:9-19.) Moreover, there was testimony that coaching and counseling is not discipline. (Tr. 1111:4-6.) Specifically, coach operator William Farmer testified that whenever he has been given a coaching, he was always told that it was not discipline. (Tr. 1111:8-9.) Farmer testified that when coach operators are issued discipline, it is on the Employer’s actual “Disciplinary Notice” form. (Tr. 1111:9-11.) Jeffrey Raske also testified that he has been told coaching and counseling is not discipline. (Tr. 1095:19-21.) Specifically, Senior Supervisor Barry Goldsmith called Raske, then a coach operator, in to see him about late pull-outs a couple years ago. (Tr. 1096:8-12; 1098:20-24.) Raske gave his explanation and Goldsmith had a paper for him to sign. (Tr. 1096:12-14.) At that time, Goldsmith stated it was a coaching, not discipline, and it would not lead to discipline. (Tr. 1096:14-15.)

⁵⁷ In *DirecTV*, it was the field supervisors (whose supervisory status was at issue) that actually met with the employee to present and explain the employee consultation form (ECF). *DirecTV*, 357 NLRB No. 149, at p. 2 (December 22, 2011). Yet, the Board still found that the field supervisors did not discipline or effectively recommend discipline within the meaning of Section 2(11) of the Act. *Id.* at p. 4.

failed to present any evidence that road supervisors are accountable for coach operators' performance or lack thereof. As such, it failed to prove road supervisors responsibly direct other employees, as defined by the Act.

L. Road Supervisors Do Not Adjust Other Employees' Grievances.

The Employer and Union's collective bargaining agreement explains the process for filing grievances; nowhere does it grant road supervisors any part in adjusting or resolving those grievances, however. (CX-2, pp. 28-30.) The Employer presented no evidence that road supervisors adjust other employees' grievances.⁵⁹ The Employer only highlighted the fact that two supervisors⁶⁰ serve on the Accident Review Board (ARB), pursuant to the parties' collective bargaining agreement. (See, CX-2, at pp.57-58.) They do so alongside two coach operators and one neutral, however, and each party has an equal say.⁶¹ The road supervisors and coach operators are both represented in equal numbers on the ARB. The fact a road supervisor may have a vote on the ARB is immaterial, as coach operators have the same input, and nobody is suggesting that coach operators are "supervisors" within the meaning of Section 2(11) of the Act.

⁵⁸ Goldsmith, who has worked for the Employer for approximately twenty (20) years testified that he "wouldn't have any idea" how many employees road supervisors are in charge of. (Tr. 327:14-16; 469:19-24.) He testified that he doesn't have any idea and could not even estimate how many coach operators that a road supervisor is in charge of. (Tr. 469:25; 470:1-4.)

⁵⁹ Even if road supervisors had the limited authority to resolve minor disputes, that would be insufficient to establish supervisory status. See, *Riverchase Health Care Center*, 304 NLRB 861, 865 (1991). Likewise, the authority to resolve personality conflicts or "squabbles" between employees also does not warrant an inference sufficient to establish supervisory status. *Ken-Crest Services*, 335 NLRB 777, 779 (2001). There is no evidence that any such authority was ever communicated to road supervisors. *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006) (finding no superior had ever discussed with the staff nurses any supposed authority to resolve CNA problems or adjust CNA grievances.)

⁶⁰ The collective bargaining agreement does not state two "road supervisors" serve on the ARB, only two "supervisors."

⁶¹ As such, to the extent road supervisors serve on the ARB, their opinion is not determinative.

M. There Is No Secondary Indicia of Supervisory Status.

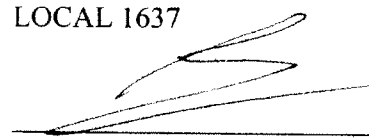
Because the Employer has failed to establish that road supervisors possess any statutory indicia of supervisory authority, any secondary indicia of supervisory authority is immaterial. See *Ken-Crest Services*, 335 NLRB 777, 779 (2001) (secondary indicia, by themselves, are insufficient to establish supervisory status). In fact, the secondary indicia further highlights that road supervisors are not “supervisors” as defined by the Act.⁶²

CONCLUSION

Road supervisors do not meet the statutory definition of “supervisors” within the meaning of the Act. The Union respectfully requests that the Board rule that road supervisors can be represented by a Union and set an election date.

Respectfully submitted,

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⁶² For example, road supervisors must wear uniforms. (See e.g., Tr. 738:17-20.) Coach operators must also wear uniforms; Senior Supervisors and others do not, however. (Tr. 303:18-22.) Also, road supervisors make approximately \$5,000.00 less per year than Senior Supervisors. (Tr. 739:17-21.) Like coach operators, road supervisors also lack their own desks and office space. (Tr. 738:23-25.) While road supervisors attend mandatory quarterly supervisor meetings, the evidence shows that they merely listen to Trevor Halleran speak and play no role in the meeting. (Tr. 892:6-18.) Likewise, at their daily briefings, road supervisors receive their daily duties or responsibilities from the field senior supervisor that is assigned to their shift. (Tr. 32:9-12.)

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of January, 2012, a true and correct copy of the above document was electronically filed on the Board's website to the attention of the following:

Cornele A. Overstreet, Regional Director
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2600 North Central Avenue
Suite 180
Phoenix, AZ 85004-3099

Michael Johnson
NLRB, Region 28
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Las Vegas, NV 89101



EILEEN M. BISSEN

I further certify that on the 27th day of January, 2012, a true and correct copy of the above document was served on the following individual via first-class United States mail:

Geoff Gilbert
McMahon Berger, P.C.
2730 North Ballas Road, Suite 200
St. Louis, MO 63131-3039



EILEEN M. BISSEN